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BIRKBECK COLLEGE, UNIVERSITY OF LONDON

***LOCATING FORGIVENESS IN CRIMINAL LAW AND
PUNISHMENT***

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**A THESIS SUBMITTED TO THE SCHOOL OF LAW OF
BIRKBECK COLLEGE, UNIVERSITY OF LONDON FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY, LONDON, JULY 2015**

ABSTRACT

In the traditional paradigm of criminal law and punishment, which is based on retribution and desert, mercy is seen as the whim of a sympathetic judge. Forgiveness is the private, emotional response of a victim, and, as such, has no place in the law. Justice requires that criminal law is fair, rationally objective and proportionate. Compassionate judges who show mercy to an offender fail to make a 'just' decision, as mercy does not treat like cases alike. A victim who wishes to forgive may do so privately, but compassion or revenge alike will be excluded from any sentencing decision.

Despite this, there is evidence of forgiveness and mercy at work, albeit in limited ways. Restorative justice practices, sympathetic to forgiveness, are incorporated into recent sentencing guidelines. Victim personal statements are now a right, not a rarity, and they are sometimes used to express forgiveness. Some criminal defences closely resemble forgiveness by any other name. Judges engage in merciful sentencing, and the compassionate emotions have been recognised in guidelines for prosecutors on 'mercy killing'. These concepts are frequently confused with mitigation and lenient sentencing.

This thesis will argue that there is a role for forgiveness in the criminal justice system, and that the gap between the private ethics of forgiveness and public mercy is narrowing. The traditional approach is to argue that Kantian retributivism must be redrawn. Forgiveness needs better definition if it is to be acknowledged in the criminal justice system at all. A total paradigm shift is unnecessary, but we can draw inspiration from alternative theoretical bases for criminal punishment, which view the subject differently. Forgiveness does not take place through a 'one-off' act but is rather through a process. The criminal justice system must accommodate those who wish to express it. This idea is not founded on reason alone, but recognises the offender as an interdependent subject. If the offender is regarded as responsible to others, and reasoned objectivity is not the only basis on which we can assess his guilt, or contemplate punishment, then forgiveness is possible and compatible with the demands of justice. This justice can accommodate the spirit of forgiveness, rather than automatically excluding it.

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Finally, this is for Darren and Jasper, who always forgive me.

DECLARATION

I certify that the thesis I have presented for examination for the MPhil/PhD degree of Birkbeck College, University of London is solely my own work other than where I have clearly indicated that it is the work of others.

I declare that my thesis consists of 92,098 words including footnotes.

CONTENTS

1. INTRODUCTORY REMARKS	7
1.1 'PUBLIC' JUSTICE.....	12
1.2 'PRIVATE' FORGIVENESS	16
1.3 FORGIVENESS IN THE SPOTLIGHT	18
1.4 IDENTIFYING THE RESEARCH QUESTION.....	21
1.5 SCOPE AND METHODOLOGY.....	30
1.6 A LITERARY APPROACH	31
2. FORGIVING JUSTICE?.....	35
2.1 MERCY AND THE 'BLOW' OF JUSTICE.....	38
2.2 THE EXCLUSION OF MERCY	46
2.3 THE CONDITIONALITY OF FORGIVENESS.....	50
2.4 FORGIVENESS, MEMORY AND RESENTMENT	60
2.5 LOCATING MERCY IN THE POLITICAL AND THE ETHICAL	64
3. MERCY AND THE RETRIBUTIVE IDEAL	69
3.1 DESERT AND THE INSTITUTIONALIZATION OF RESENTMENT	72
3.2 THE PHILOSOPHICAL BACKGROUND: THE INFLUENCE OF KANT	74
3.3 RETRIBUTIVISM, MORAL JUDGMENT AND ALIENATION	80
3.4 KANT'S OWN OBJECTIONS TO FORGIVENESS AND MERCY	84
3.5 RETRIBUTIVISM, SELF-RESPECT AND THE VALUES OF VINDICTIVENESS	88
3.6 THE BALANCE OF VIRTUE AND DUTY.....	91
4. CHALLENGES TO THE RETRIBUTIVE APPROACH	95
4.1 A CHALLENGE TO THE IDEA OF THE AUTONOMOUS INDIVIDUAL: ALAN NORRIE.....	98
4.2 A RESPONSE TO JEFFRIE MURPHY.....	106
4.3 A CHALLENGE TO THE IMPORTANCE OF KANTIAN REASON: LINDA ROSS MEYER.....	109
4.4 RELATIONAL THINKING	117
4.5 SETTING OUT AN ARGUMENT FOR INTERSUBJECTIVE MERCY	121

5. LOCATING MERCY IN RESTORATIVE JUSTICE.....	125
5.1 THE RESTORATIVE JUSTICE MOVEMENT	127
5.2 THE EMERGENCE OF RESTORATIVE JUSTICE IN THE UK.....	129
5.3 FORGIVENESS IN RESTORATIVE JUSTICE.....	132
5.4 RESTORATIVE JUSTICE, REPENTANCE AND RETRIBUTION.....	136
5.5 RESTORATIVE JUSTICE, POWER AND THE PROCESS OF FORGIVENESS	138
6. LOCATING COMPASSIONATE JUSTICE	141
6.1 THE SEDUCTION OF COMPASSION	145
6.2 VICTIM PERSONAL STATEMENTS.....	152
6.3 IMPLEMENTING COMPASSIONATE JUSTICE.....	159
6.4 LOCATING THE COMPASSIONATE EMOTIONS IN THE CRIMINAL DEFENCES.....	162
6.5 ARTICULATING MERCY AND FORGIVENESS.....	172
7. FORGIVENESS AND THE INTERCONNECTED SUBJECT	175
7.1 LEVINAS AND THE FACE OF ETHICAL FORGIVENESS	177
7.2 LEVINAS, FORGIVENESS AND A MOMENT IN TIME	186
7.3 SETTLEMENT, TRAUMA AND BEING-WITH-OTHERS	189
7.4 FORGIVING THE INTERCONNECTED SUBJECT	220
8. THE LONG ROAD TO FORGIVENESS: CONCLUDING REMARKS	221
BIBLIOGRAPHY.....	231
LEGISLATION.....	231
CASES	231
COMMAND PAPERS AND REPORTS	232
BOOKS	232
JOURNALS	237
ELECTRONIC RESOURCES	238

1. INTRODUCTORY REMARKS

The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven upon the place beneath
It is twice blest; it blesseth him that gives and him that takes
'Tis mightiest in the mightiest: it becomes the throned monarch better than his crown
His sceptre shows the force of temporal power, the attribute to awe and majesty
Wherein doth sit the dread and fear of kings
But mercy is above this sceptred sway.
It is enthroned in the hearts of kings - it is an attribute to God himself.
And earthly power doth then show likest God's when mercy seasons justice.¹

In Shakespeare's words, mercy should 'season' justice. Like equity, it ought to be exercised when the strict application of the law is too harsh, and makes a legal decision better, kinder, more just.

Contemporary norms of criminal law, criminal justice and penal policy suggest that those who offend must be sought out, hunted down, judged, dealt with, punished, but certainly not forgiven. 'Just' punishment is associated with vengeance or 'getting back'² and this is supported by media rhetoric on sentencing policy, which seems to respond to populist demands for draconian punishment.

The criminal law will rarely acknowledge the language or practice of mercy or forgiveness except as an unwelcome intrusion³. Mercy is seen as being at odds with justice because it does not treat like cases in a similar way. The concern of those who oppose it is that like cases are not being treated alike in these instances, leading to injustice, unfairness and a loss of objectivity. In an efficient, fair system of criminal law, in which the guilty are punished, and the innocent are not convicted, there

¹ William Shakespeare, 'The Merchant of Venice' in Stanley Wells and Gary Taylor (eds) *The Complete Oxford Shakespeare*, (Guild Publishing 1998) p.625.

² The responses of David Cameron and President Obama during, respectively, the riots in London and the pursuit and killing of Osama Bin Laden both used the word 'justice' in this way: 'I am determined, the Government is determined that justice will be done and these people will see the consequences of their actions. And I have this very clear message to those people who are responsible for this wrongdoing and criminality: you will feel the full force of the law and if you are old enough to commit these crimes you are old enough to face the punishment' – 'London Riots: Prime Minister David Cameron's statement in full' *The Telegraph* (London, 9 August 2011); and 'we will be relentless in defense of our citizens and our friends and allies...we will be true to the values that make us who we are. And on nights like this one, we can say to families who have lost loved ones to al-Qaeda's terror: justice has been done.' *ABC News* (New York, 2 May 2011).

³ Anthony Duff, 'The Intrusion of Mercy' (*Ohio State Journal of Criminal Law* 2007) Vol 4, p.461.

should, in theory, be no need to redress the system with a merciful judgment. A judge who grants mercy cannot be just, a judge imposing a just sentence cannot be merciful⁴.

Nonetheless, there is evidence of mercy and forgiveness. In sentencing, judges use tactics that closely resemble mercy. These are hardly ever acknowledged as such. In the form of a judgment or sentence, it acts as a kind of ameliorative equity⁵ or occasional correction to the strict application of the law, perhaps inspired by sympathy for the offender's personal circumstances. For example, the judge might feel that the offender has 'already been punished enough'⁶ and this might occur, for example if a man was found guilty of the manslaughter of his own child, or if the offender was terminally ill.⁷ It might also apply when an offender had good motives as in 'mercy' killing⁸ or had shown genuine remorse. In these circumstances, the legal punishment is reduced or removed. These instances of the exercise of mercy by a judge are rare, and distrusted by those who would prefer the strict legal punishment to be applied. The concept of mercy is therefore legally unclear, frequently being confused with mitigation, lenient sentencing or the substantive criminal defences. The language used to describe it contributes to this confusion, as the many terms used to describe the concept are used interchangeably. These include mercy, pardon, condonation, forgiveness, and clemency. Where mercy does occur, there are no guidelines to such decisions and an offender in these circumstances will be relying on the discretion of an understanding judge. In the UK, pardons are rare, except in the form of the Royal Prerogative of Mercy. Forgiveness, closely related to mercy, is a

⁴ Linda Ross Meyer, *The Justice of Mercy*, (University of Michigan Press, 2010) p.1.

⁵ Linda Ross Meyer, *The Justice of Mercy*, (University of Michigan Press, 2010) p.3.

⁶ *Burcher*, The Times, July 21, 1987 referred to in Glanville Williams, 'Criminal Omissions: The Conventional View' (1991) 107 LQR p.91 'in which the defendant (an unemployed man, apparently a single parent), who was doing his best to bring up two children, left them alone in his flat for about 30 minutes one evening, with instructions to take a bath. His son, aged 9, was a boy who delighted to surprise his father with his help. He got a hair drier from another room and, using an extension lead which his father used for listening to music in the garden, operated the hair drier in the bath. The drier, of course, fell into the bath and both children were electrocuted. The defendant had previously been found guilty of neglecting the children, but we are not told the nature of his neglect on this previous occasion. He was sentenced to 18 months' jail, reduced to 12 months on appeal. The evidence showed that he had been a loving father, and the judge, in sentencing, generously added: 'Whatever sentence I pass will be as nothing to the distress you have suffered and are still suffering.'

⁷ This kind of mercy, and how it operates, will be discussed in Chapter 2.

⁸ The term 'merciful sentencing' was used to describe the judicial approach to previous, similar cases in the case of Nicklinson, a 'mercy killing' appeal: *R (on the application of Nicklinson and Another) v Ministry of Justice* [2014] UKSC 38.

private matter, and has no place in the law. Instead, it belongs in the private, ethical sphere; mercy is to be found in the public, political sphere of the courts and the executive. As such, there is a confusing approach to mercy and forgiveness, and an uncertain philosophical background to the criminal law. On the one hand, our legal language cannot tolerate mercy and forgiveness; on the other, it is being exercised in the substantive law and in sentencing practice and policy. There is a failure to acknowledge it. Nonetheless, it is in this paradox that a new understanding of forgiveness may be located. It may no longer be true to say that forgiveness is private and is no concern of the state.

The concern is that in a system based on retribution and deterrence, and increasingly on shame and stigmatisation, no-one benefits; recidivism is ripe and victims leave the criminal justice process dissatisfied. Sentencing guidelines in recent years have concentrated less on the rehabilitation of offenders, than on deterrence and retribution, and increasingly harsh sentences not only seem to over punish the offender, but often also do little to assuage the victim of the crime, who can feel let down by the abstract and impersonal nature of the adversarial process. There is concern over a growing prison population⁹, overcrowding and deaths in custody, as the increased use of prison as a punishment and rising costs mean that rehabilitation and education are not the key focus. Victims often feel dissatisfied due to the adversarial nature of the trial, from which they are excluded, their role being limited to witnesses for the prosecution.¹⁰ Whilst criminal justice agencies and legislators are increasingly tougher on those who disrupt society, there is also often a feeling of dissatisfaction on the part of victims, which usually occurs all the way through: from the moment of investigation, throughout the adversarial trial process and until the moment of conviction, sentencing and potential re-offending:

⁹ At the time of writing, the prison population of England and Wales was 85,834. Since the start of 1993, the number of prisoners has risen from 41,600 to more than 80,000. Chris Grayling's initiative to reduce access to books for prisoners emphasises the shift from reparation to punishment in current penal policy. (Howard League for Penal Reform)

¹⁰ 'Victims...have been marginalised to the point of constituting the forgotten party in criminal justice, whose own conflicts have been stolen by professionals and experts.' Nils Christie 'Conflicts as Property' *British Journal of Criminology* Vol 17 (1) p.1-15 cited in Adam Crawford 'In the Hands of the Public in a Restorative Encounter' in Gerry Johnstone (eds) *A Restorative Justice Reader: Texts, Sources, Context* (Willan Publishing 2003) p.313.

modern criminal justice has little room for forgiveness. It has become an assembly line, a plea-bargaining factory that speeds up cases and reduces costs by sacrificing the offender's and victim's day in court....the logic of adversarial combat leads each side to take an antagonistic posture, instead of engaging in dialogue and seeing the other's point of view.¹¹

Forgiveness is, however, increasingly being recognised as a more dignified, measured response to violent criminal acts than vengeance, victimisation and vigilantism. It is also widely practised and admired by many as a tool for reparation and healing in everyday life. Some victims will want to forgive and engage in restorative justice. Those victims who do not seek violent retributive punishment as a response to violent crime are regarded as unusual, even if privately we admire their strength and courage.

There is also a contradiction at play in penal policy in that there is, despite populist sentencing, increasing interest in a restorative, reconciliatory approach to justice along with demands to improve the lot of victims in the criminal trial. This means that the gap between the public domain of criminal justice, and the private domain of restitution and reconciliation, usually reserved for civil matters, is narrowing. Whilst victim personal statements may be read out in court prior to sentencing, it is viewed as dangerous to allow emotions of any kind into the objectivity of the criminal trial. This is true whether the victim's feelings are vengeful or compassionate. Forgiveness *from* a victim may take place as a private gesture, but it does not form part of the sentencing process. Even in restorative justice, it has a limited role. Any desire on the part of a victim to show compassion is viewed as belonging properly to the domain of the private emotions, not to the public criminal trial, which must remain impartial, objective and fair to all. The victim of crime is represented in a criminal court by the Crown, and has no further role than as a prosecution witness. As I will explain, this was not always how mercy and justice were represented, but it is a true representation of their place in modern criminal justice. I will argue that the conception that the State has or should have a limited role in exercising forgiveness can be challenged. Moreover I contend that the State may have a place in the exercise of forgiveness in the criminal trial.

¹¹ Stephanos Bibas 'Forgiveness in Criminal Procedure' (*University of Pennsylvania Law School Faculty Scholarship*, Paper 920, 2007) http://scholarship.law.upenn.edu/faculty_scholarship/920 (accessed 14 June 2014) p.329.

Why does the law exclude mercy and forgiveness in this way? In this thesis, I will argue that despite the well known principles of the adversarial criminal trial which implies that the law cannot accommodate forgiveness, that it is, in fact, tolerated in various guises. I will argue that although forgiveness and mercy are viewed with suspicion, they can be located in both the substantive criminal law and in the sentencing process. I will show how elements of forgiveness can be found in the criminal defences, in merciful sentencing and in the restorative justice movement. We see merciful judgments frequently, but the concept is difficult to dissociate from excuses, mitigation and lenient sentencing. The victim's rights movement is gaining momentum. With this in mind, I will show that the view that victims have an insignificant role in the criminal trial is no longer valid, and that the traditional position that emotions must be excluded from the criminal trial cannot continue if victims are to be accorded a more prominent role. All these instances of forgiveness and compassion are present, but they are present in very limited, and often unacknowledged ways. Victim forgiveness is recognized, at least, in the restorative justice process. Restorative justice is often heralded as the answer to the problems of the criminal justice system, but I will show that at its heart it fails to articulate mercy and forgiveness any better than the traditional criminal trial.

The tension between mercy and justice is an old one, as Shakespeare's quote at the beginning of this chapter demonstrates. I will argue that mercy and forgiveness are not necessarily at odds with retribution, but that their use in criminal law lacks a coherent philosophical or practical base. What is needed is some clarification on the nature of mercy and forgiveness in criminal law, along with an acknowledgement that the private nature of forgiveness, and the public nature of punishment are no longer viable divisions. This may create a backdrop in which mercy and forgiveness are possible. I will argue that victims' rights and the idea of mercy are linked, and that to give victims more say in the criminal justice process, without considering mercy and forgiveness, is shortsighted.

Other than arguing for a re-statement of the role of mercy, it may also be that a theory of mercy and forgiveness cannot be located in retributivist policy. I will argue, however, that a true version of retribution and desert is not representative of sentencing policy at present. An understanding of the theoretical basis for punishment

will enable us to locate a present and future place for mercy. I will argue that forgiveness is a process which can have a place in the criminal trial. In order to achieve this, I will argue that we need not entirely reject the idea of desert or proportionality in sentencing, but that other theories of morality and criminal responsibility can enable us to give forgiveness a place and a voice.

The current adversarial system has many critics. These criticisms mainly focus on the forming of the criminal subject as an abstract individual. I will show that though these criticisms address the criminal subject, they could go further. Through a critique of the criminal law I will demonstrate that if we approach morality from a different understanding of the criminal subject, one which is connected to others, we can accommodate the spirit of mercy and forgiveness. Elements of this new understanding of the criminal subject could be used to locate forgiveness and mercy. In this chapter, I will briefly outline those features of the adversarial system which prevent a clear articulation of mercy and forgiveness. I will then identify the scope and questions to be raised in the present project, and how I intend to deal with them.

1.1 'Public' Justice

If we allow mercy and forgiveness, this means by implication that the penal system has failed in some way. This is because in a Western model of a democratic society, citizens have entered the 'social contract', whereby certain freedoms are sacrificed in order to safeguard others. This includes passing the business of punishment to the State. The Enlightenment principles of fairness and equality for all sought to acknowledge that whilst an individual could choose to commit a crime, he also accepted that punishment would ensue when the social contract was broken by a deviant behaviour.

This social contract envisaged by Enlightenment thinkers such as Hobbes, Rousseau, Locke and Kant¹² operates on the basis that those who commit crimes against the State, or against another individual do so on the basis of autonomous agency; that is to say, the subject bears full responsibility for his actions. Thus, in the commission of crime, a choice is made, in the full knowledge and acceptance that it will attract

¹² The idea of the social contract is the idea that citizens exchange freedom for protection by the State.

punishment from those in power, from those who have been elected to inflict such sanctions. This punishment is an expectation flowing from the terms of the agreement, but also a 'right'. Why should anyone want the 'right' to be punished? In acknowledging this right, the governing State is showing respect for the citizen as a fully autonomous individual, capable of rational thoughts, and of doing his moral duty. In this way, the social contract creates rights and obligations on both sides. In other words, the ideal retributive system of justice gave birth to the idea of a perfect balance between citizen and State, the former entering into a social contract with the latter, which was democratically chosen¹³. The citizen had entered into this relationship and chose to be guided by a sovereign, who would no doubt make decisions beneficial to all. In law, the citizen is a 'juridical'¹⁴ individual – a free, autonomous, rational being with full agency.

In terms of the evolution of criminal law and punishment, the result of the changes brought about by the Enlightenment was a *retributive* ideal of criminal law and punishment. Retribution in this sense did not mean excessive revenge for wrongs committed or violent punishment which had characterized the mediaeval era, but was based on *desert*. The offender is given the punishment he deserves. When he makes a rational choice to commit a crime, he does so on the understanding and the expectation of just punishment, before society can accept him back into the fold. According to this understanding, punishment is a question of moral desert, which follows the decision of a rational human being to commit a crime.

The social contract was translated into practice through law:

Enlightenment thinkers sought a rational and humane social order in contradistinction to the arbitrary power of absolute monarchy. The Enlightenment was a project which especially sought to create its actuality through law; the law reflected and condensed Enlightenment thought in practice.¹⁵

In the United Kingdom, this was influenced by the moral philosophy of Immanuel Kant, which has had a significant effect on criminal law and penal policy. A major

¹³ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press 2000) p.6.

¹⁴ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press 2000) p.6.

¹⁵ Claire Valier, *Theories of Crime and Punishment*, (Longman, 2002) p.6.

characteristic of that philosophy is that justice cannot allow for forgiveness, which belongs to the private, emotional realm of individual disputes. It takes place, instead, in public through punishment. A further characteristic of Enlightenment penal policy is its fairness. Punishment is proportionate to the crime, and like cases are treated alike, with the offender being given an 'abstract' quality:

the [Enlightenment] project rested in a view of controlling the individual in their capacity as a thinking person able to make decisions and choices. The legal subject at the foundation of modern law was very much the Enlightenment's 'man of reason'.¹⁶

This stood in sharp contrast to the punishments and trial processes of the mediaeval era. The change in focus from punishing the body of the criminal to a controlling of the soul which characterises the rehabilitative model of punishment, is described in colourful detail in Foucault's seminal *Discipline and Punish*¹⁷. The offender's personal circumstances could not, however appealing, be taken into account in this system. This is the justification for the fact that mercy does not sit easily in a retributive, desert-based system of law and punishment. The State could be merciful in very restricted circumstances in the UK, in the form of the Royal Prerogative of Mercy¹⁸, 'forgiving' in certain contexts. Pardons, clemency and mercy are ways in which a State imposed punishment may be reduced in some way. However, there was no room for mercy or forgiveness in criminal law, which was an unnecessary addition to the system. If laws were carefully thought out, and if punishment was proportionate to the crime, there should be no need for a judge to remedy errors, or soften a sentence. Any punishment arose from the free will of the individual committing the crime, and as such any reduction in punishment for merciful purposes would be disrespectful to the offender as a free-thinking individual.

Apart from the central role of the social contract and the importance of reason, a key characteristic of just, retributive punishment is the idea that there is no place for a victim in a criminal trial. Historically, the legal system had not excluded victims in this way, and criminal law was more akin to a civil dispute. This meant that there was

¹⁶ Claire Valier, *Theories of Crime and Punishment*, (Longman, 2002) p.6.

¹⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (trans Alan Sheridan, Penguin, 1977).

¹⁸ The Royal Prerogative of Mercy is one of the Royal Prerogatives of the monarch, but is now only exercised through the executive.

room for forgiveness. In a more 'public', State-run understanding of punishment, this could not be the case.

The Enlightenment version of penal policy has been widely criticized¹⁹, usually on the grounds that it is contradictory and discriminatory. The picture drawn above is one of 'perfect' criminal justice. True 'justice' has no need of mercy and forgiveness as justice is done properly through sentencing guidelines based on fair principles. Judges do make merciful judgments, but no clear policy relating to them emerges.

Forgiveness is almost completely excluded, being a private, personal matter between individuals and therefore not a matter for the State. It represents the 'soft emotions'²⁰ and has no part at all in the perfect State, which has been entrusted with the role of determining and imposing punishment. As no formal role has traditionally been allocated to the victim in pre or post trial decisions in a system in which victims of crime have traditionally been regarded at most as bystanders or as prosecution witnesses²¹, victims' views cannot also be taken into consideration in any remission of that punishment. As we shall see, the role of victims in the criminal trial is changing. In addition to the need for a better articulation of mercy in the public context, one of the contentions of this thesis is that the perception of justice as a public construct may be changing. As a result, there may be room for forgiveness, should a victim wish to express it.

¹⁹ In this thesis, I will concentrate on the criticisms of Alan Norrie.

²⁰ See the discussion generally contrasting the 'harder' topics of punishment and sentencing with the 'softer' topics of forgiveness, mercy and excuse in Jeffrie G. Murphy and Jean Hampton *'Forgiveness and Mercy'* (Cambridge University Press 1988) p.7.

²¹ Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of 'Their' Offenders' [2002] Crim LR p. 689.

1.2 'Private' Forgiveness

Victim forgiveness, as a private emotion, has no place in the rational criminal law as it is based on the irrational, emotional view of a person wronged. If the aim of the ideal retributive criminal justice system is to achieve justice, then forgiveness, in its many forms, works against this ideal because it is considered to be arbitrary, irrational, emotional and disproportionate. Neither excessive revenge and retaliation, nor gestures of forgiveness towards forgiving the offender are tolerated in such a system, which must remain fair and proportionate. To forgive an offender is in direct contradiction to punishment, according to retributivist principles. This is the way it should stay, according to some observers²². Although victim 'impact' or personal statements allow a victim to express feelings at the sentencing stage, these should not affect the sentence, but are there to provide the victim with a voice. Any gesture of forgiveness on the part of the victim must remain a private arrangement. The role and voice of victims in the criminal trial is changing, however. The lines between public and private justice are becoming blurred. It may be that in these contradictions, we can find a place for mercy.

On the one hand a rational system of justice cannot tolerate forgiveness because it is a private matter; on the other hand, there is a call²³ for victims of crime to have more say in the process, despite the risks²⁴ related to proportionality and fairness.

Is this a true representation of today's criminal justice system? Some victims do want their views to be taken into account, and some would counter argue that rather than being a soft option it allows defendants to take on more, rather than less responsibility for their actions. The adversarial system can be cruel and hard to swallow and victims of crime can emerge feeling that no one has really benefited.

Recent initiatives have emphasized the role of victims in the criminal justice system. A proposal that allows victims to challenge prosecutorial decisions has been

²² See for example Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of 'Their' Offenders' [2002] Crim LR p.689 arguing that the role of victims in the criminal justice system should be limited to conserve values of proportionality.

²³ Home Office, Putting Victims First, More Effective Responses to Anti-Social Behaviour, (White Paper, Cm 8367, 2012).

²⁴ Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of 'Their' Offenders' [2002] Crim LR p. 689.

announced²⁵, and the use of victim impact statements in sentencing is now commonplace, and has become obligatory. Although these statements are not supposed to influence the judge in his sentencing decisions, there is evidence that it is difficult for a judge to ignore them. The increasing role of victims is likely to allow for a greater role of emotions in the sentencing process.

Apart from projects like this, the restorative justice movement, which calls for victim and offender interaction, is often used in response to criminal offences. This movement recognises the fact that this interaction appears to reduce re-offending and attempts to address the problems faced by victims in the criminal trial. It has been incorporated directly in the criminal justice system, and more specifically in the context of property offences and youth offending²⁶.

New principles of criminal justice are emerging. The restorative justice movement seeks to place more emphasis on the rights of the victim, and there are many calls for victims to have more of a say in the process, including the decision to prosecute. Proponents argue that models of restoration ultimately serve society better, in that they focus on rehabilitation rather than retribution and on the re-integration of the offender into society, so that both the perpetrator and the victim can re-build their lives. This may pave the way for a place for forgiveness and mercy.

²⁵ Director of Public Prosecutions, Victims' Right to Review Interim Guidance (June 2013).

²⁶ Home Office, Putting Victims First, More Effective Responses to Anti-Social Behaviour, (White Paper, Cm 8367, 2012).

1.3 Forgiveness In The Spotlight

Forgiveness is attracting attention, even in the context of extremely violent crime. Not all victims desire revenge and there are active theoretical²⁷ and practical²⁸ calls for the incorporation of forgiveness into the processes involved in criminal law and punishment, for example in the restorative justice movement and in the many international examples of truth and reconciliation commissions. The process leading to it is an important social ritual. We tell children to apologise in order to smooth the way: family members, friends, and colleagues routinely express remorse and seek forgiveness from those whom they have wronged.²⁹ News items of victims wishing to forgive are frequent. Often, these emphasise that forgiveness can be empowering rather than weak. They are often surprising, but confirm that not all victims desire vengeance³⁰. A discussion of these narratives of forgiveness and the importance of story telling will be explored in Chapter 7. There is anecdotal³¹ and empirical³² evidence of the use of forgiveness both as a tool for helping the victim to heal and for encouraging repentance and reparation on the part of the wrongdoer. Initiatives such as the Forgiveness Project, an exhibition of narratives of responses to specific instances of violent crime in Northern Ireland, Rwanda and the Brighton Bombings, are testament to this movement. The Forgiveness Project is a UK-based charity that uses storytelling to explore how ideas around forgiveness, reconciliation and conflict resolution can be used to impact positively on people's lives, through the personal

²⁷ See the argument for a 'paradigm of forgiveness' in Margaret Holmgren *'Forgiveness and Retribution: Responding to Wrongdoing'* (Cambridge 2012).

²⁸ Stephanos Bibas 'Forgiveness in Criminal Procedure' (*University of Pennsylvania Law School Faculty Scholarship*, Paper 920, 2007) http://scholarship.law.upenn.edu/faculty_scholarship/920 (accessed 14 June 2014) p.329

²⁹ Stephanos Bibas 'Forgiveness in Criminal Procedure' (*University of Pennsylvania Law School Faculty Scholarship*, Paper 920, 2007) http://scholarship.law.upenn.edu/faculty_scholarship/920 (accessed 14 June 2014) p.329.

³⁰ In January 2006, Katja Rosenberg was attacked and raped on her way home from work. She describes her decision to forgive her attacker as 'empowering' and as something she could give to her attacker to help her achieve closure. She also refers to the personal circumstances of the offender and the process of restorative justice which enabled the meeting. These themes of forgiveness as gift, of power and of narrative will all be discussed in this thesis. < http://www.huffingtonpost.co.uk/2014/01/09/rape-katja-rosenberg_n_4568283.html> accessed 20 August 2014

³¹ The work of the Forgiveness Project is a good example of these narratives. The project brings together a number of personal narratives which share the common theme of forgiveness in the context of stories with origins as diverse as Rwanda, Northern Ireland, South Africa and the London Underground Bombings in 2005.

³² Loren Toussaint and Jon Webb, 'Theoretical and Empirical Connections Between Forgiveness, Mental Health and Well-Being' in Everett L. Worthington, Jr (eds) *The Handbook of Forgiveness*, (Routledge 2005) p.349.

testimonies of both victims and perpetrators of crime and violence. The aim is to provide tools that facilitate conflict resolution and promote behavioural change. To achieve this they collect and share real stories of forgiveness and reconciliation to help individuals transform the pain and conflict in their own lives.

Stories gathered by the project range from forgiveness for crimes committed in the Israeli-Palestinian conflict, Bosnia, Rwanda and Northern Ireland as well as forgiveness of individual criminal acts of violence committed by gangs and individuals in the UK, including domestic violence situations, children killed in gang violence, and unexplained, senseless murders. There are testimonies from perpetrators, victims and joint statements from victims and offenders who have chosen to work together.

The Forgiveness Project's Restore Programme operates in several UK prisons:

encourages critical evaluation and reflection through narratives of trauma, responses to that trauma and the potential roles of forgiveness... crucially the programme invites victims of crime into prison to share their stories.³³

It is a two-way process, prisoners start by hearing stories of victims and how they have come to terms with their loss, before they then share their own stories. What emerges from the workshops is that both sides do sometimes seek forgiveness and that offenders often long for opportunities to make things right. However, they fear that any apology would be inadequate, although victims say that forgiveness brings relief from painful feelings and broken relationships:

these often harrowing stories of loss, abandonment, and violence reveal how victims of crime and violence can be transformed by forgiveness and reconciliation (whether actual reconciliation with the perpetrator or simply finding resolution within oneself). The dialogue is healing not only to the offender but also to the victim. The use of victims' stories provides the opportunity for prisoners to address the harm they have caused to others, as well as exploring the relationship between themselves as victims and the victims of their crimes. Encouraged by hearing victims' stories, participants

³³ Maria Cantacuzino 'A programme for prisons that encourages prisoners to explore concepts of forgiveness in a framework that fosters greater accountability and responsibility' (in '*Exploring Concepts of Forgiveness in Prisons*' 2009) < <http://www.inter-disciplinary.net/wp-content/uploads/2011/06/cantacuzinofpaper.pdf> > accessed 14 July 2014.

on the course then share their own narratives. It is extraordinary how in this place of brokenness, real connections are made.³⁴

What is emphasised here is the progressive nature of forgiveness. It is a process, rather than a solution.

forgiveness is not a single magnanimous gesture in response to an isolated offence; it is part of a continuum of human engagements in healing broken relationships. Nor is it a one-off event because one day you might forgive and the next day hate all over again. Above all, it is difficult, costly and painful, *but* potentially transformative. An integral step to forgiveness, as *The F Word* stories show, is to face the past because if you do not face the past, it can run you all your life.³⁵

Above all, forgiveness must be a choice. To expect someone to forgive can victimize them all over again. Forgiveness is also a journey and not a destination.

The Forgiveness Project's exhibition, *The F Word*, shows all too clearly that forgiveness means many different things to different people. It is deeply personal, often private and far from the soft option many take it to be. The stories on this website show that often forgiveness is difficult, costly and painful – but potentially transformative. Forgiveness is often considered the mental, and/or spiritual process of relinquishing resentment, indignation or anger towards another person for a perceived offence, or ceasing to demand punishment. It is quite separate from justice (meted out by the state through the courts or some other delegated authority). Many stories in *The F Word* exhibition show that forgiveness can be a useful life skill, which can liberate a person who has been hurt, releasing them from the grip of the perpetrator. It is connected with acceptance and moving on. Some have said forgiveness is giving up all hope of a better past. In this sense forgiveness is also an act of self-healing, rather than an act of kindness towards someone who has hurt you. In some contexts, forgiveness may be granted without any expectation of compensation, and without any response from the perpetrator (for example, you can forgive a person who shows no remorse or a person who is dead). In other contexts, it may be necessary for the

³⁴ Maria Cantacuzino 'A programme for prisons that encourages prisoners to explore concepts of forgiveness in a framework that fosters greater accountability and responsibility' (in '*Exploring Concepts of Forgiveness in Prisons*' 2009) <<http://www.inter-disciplinary.net/wp-content/uploads/2011/06/cantacuzinofpaper.pdf>> p.4 accessed 14 July 2014.

³⁵ Maria Cantacuzino 'A programme for prisons that encourages prisoners to explore concepts of forgiveness in a framework that fosters greater accountability and responsibility' (in '*Exploring Concepts of Forgiveness in Prisons*' 2009) <<http://www.inter-disciplinary.net/wp-content/uploads/2011/06/cantacuzinofpaper.pdf>> p.4 accessed 14 July 2014.

perpetrator to offer some form of acknowledgment, an apology and/or reparation in order for the wronged person to believe they are able to forgive.

A number of themes emerge from the above discussion. The Forgiveness Project stories show that forgiveness has different facets. It may be given as a gift, it may require repentance or an apology; it can be a source of strength for the victim, and most importantly, it is a process. We can say that the way in which mercy and forgiveness are represented in the criminal law is inconsistent - both in language and in practice. There is clearly a split between public and private: mercy is exercised publicly, forgiveness is a private gesture. Nonetheless, both are needed, and used, informally and formally. However, they are not articulated properly. The role of repentance and apology is not clear, and no clear guidelines exist. The private nature of forgiveness is creeping into the public domain in the guise of victim personal statements and restorative justice, which may mean that the principles of our desert and retribution are no longer as clear cut as they once were. Forgiveness is taking place, in quasi-legal settings such as parole boards and restorative conferences, but law denies it. As this thesis develops, we will see that this type of forgiveness which is often a long process, can be accommodated in the criminal justice system.

1.4 Identifying The Research Question

The law, traditionally, has no place for forgiveness as it is constrained by its self-imposed rationality and insistence on objectivity, not emotion. This is true whether we are considering public mercy or private forgiveness.

In this thesis, I intend to examine these arguments against forgiveness and mercy, and explain the reasons the system views it with such suspicion. I will argue that the act of forgiveness and mercy can be located in the criminal justice system under various guises; and that it can be found in unexpected places, such as, in merciful sentencing and in criminal defences.

Forgiveness also seems to emerge, for example, in victim personal statements and in anecdotal narratives, such as those recorded in the Forgiveness Project exhibitions. Many of those involved have participated in the criminal justice process and have tried to express their wish to forgive in that context. This has proven to be difficult. However, attitudes to victim choice are changing and so might our attitude to those

who have created those victims and harmed them. The role of emotions in law is an important consideration here. I will discuss this and in particular the role of compassion and its use by both victims and judges. I will show that although vindictiveness is rejected as a valid consideration in legal decision-making, it is actually being used and encouraged. If this is true, it is also true that victims should be able to express forgiveness should they wish to do so.

Once we have accepted that criminal law contains contradictions and inconsistencies, we may also accept that the traditional dichotomy between emotional forgiveness and rational law is a false one. An acceptance of elements of each paradigm might be the best approach. Somewhere in between lies the possibility of forgiveness.

In Chapter 2, I attempt to delineate some of the confusions surrounding forgiveness and mercy as a philosophical and a legal concept. Before embarking on this discussion, and due to the inconsistencies in theory and practice referred to above, it will be useful at the outset to attempt to briefly define some of the terms used to describe the idea of forgiveness along with some of its related terms such as mercy, pardons, clemency and condonation. We can challenge the paradigm of individual subjecthood when we are assessing criminal liability and sentencing offenders, and therefore challenge objections to mercy. Mercy can be also be found if we look for it, but it is frequently conflated with other, similar concepts such as mitigation. In relation to the latter, definitions are important. Is mercy a reduction of punishment, an erasing of it, or simply a personal decision to cease resentment? Does forgiveness require an apology, or repentance, or is it a gift, freely given? If so, what do we mean by that resentment, and how is it related to justice and mercy? Can justice be achieved even if we express forgiveness, or reduce a punishment? I trace the origins of the meaning of what it is to forgive, and examine different interpretations of forgiveness. I will discuss the nature of forgiveness, including whether it is an act of grace that can be given freely, or has conditions, such as repentance, attached. The role of language is important and I try to distinguish between closely related concepts in the area, such as in the relationship between *actus reus*, *mens rea* and defences; mercy, excuse, justification and forgiveness. I will start by explaining and defining the many terms used to describe types of forgiveness. There are also other important themes to consider, including whether forgiveness is to be regarded as reconciliation,

condonation or amnesia. I will show how the incorporation of forgiveness in to the sentencing process does not exclude the possibility of justice. In this way I will demonstrate that there is another way, and that the dichotomy of the existing literature may exclude the possibility of simply acknowledging that some victims want to forgive.

In Chapter 3, I will trace the development of criminal law and punishment to its Enlightenment roots. Kant, among others, is recognised as the most influential philosopher in the design and implementation of modern principles of criminal law theory. I will explain how criminal law is Kantian, and later, why forgiveness cannot be tolerated in such an ideal. I will examine the role, past and present, of mercy and forgiveness in the specific context of retributive criminal law and punishment. I will sketch Kant's philosophy of punishment as it is based on his moral philosophy. This is driven by the punishment philosophy of retributivism and desert, rather than utilitarian philosophies of deterrence and incapacitation. The punishment philosophy of retributivism, based on the idea that the offender should receive the punishment he deserves, rather than an excessively vengeful one, drives Kant's view of the duty to punish. These terms will be explained and analysed, and then I will evaluate the place of forgiveness in his thinking. Whilst Kant excluded the idea of pardons, and criticized their prolific use during his lifetime, he was prepared to accept that forgiveness could be a duty of benevolence. In State punishment, however, there is no place for mercy or pardons. The system is based on reasonable laws made by a reasonable community. The State has a duty and the obligation to punish. There is no need for leniency, or other departures, from strict legal rules as law is just, logical and universal. How did Kant's moral philosophy come to form the basis of the criminal law? For mercy, this meant that the law developed from a position where it was essential, to one in which it was excluded.

The offender must be punished for committing the offence and causing the harm (to the victim and to the wider community and for gaining an unfair advantage); secondly, the offender must be punished for his transgression of morality (in other words, for his bad moral character). In other words, we punish the crime, and the criminal. Both of these aspects still currently form part of our punishment philosophy. These distinctions are important for an argument that suggests forgiveness should be

part of sentencing decisions. In terms of judging moral character, it will be argued that forgiveness is a way to separate the person who has committed the act from the act itself; in other words, to hate the sin, but not the sinner. If we are to do this, do we also accept that punishment will take place? Is repentance needed for forgiveness?

There are a number of supporters of the Kantian, retributivist view. In particular, Jeffrie Murphy, a forgiveness-sceptic, supports the fact that it excludes forgiveness. I will critique his argument, and show that his assertion that a victim who forgives does not lack self-respect, as he asserts, but on the contrary, retains that self-respect when he regains power and strength through the ability to forgive.

The history of mercy, and its relationship to justice is considered. The relationship between justice and forgiveness is discussed. In this regard, I draw on Marty Slaughter's tracing³⁶ of the origins of mercy, and its relationship with equity. Slaughter shows how it was incorporated into the law until Enlightenment principles of deterrence and retribution became more commonplace.

Having set out the background to the common law's reluctance to accept mercy and forgiveness in its paradigm, I will then turn to some opponents of the Kantian view.

In Chapter 4, I will show that there are several well-known and important challenges to this view. These will be examined before I present a new theory, in which forgiveness may flourish. To help in this task, I draw on the work of Alan Norrie, who has written extensively about the contradictions inherent in our Kantian system of criminal law and justice. In his relational critique of Kantian responsibility³⁷ for criminal acts he tackles the liberal universal approach, arguing that the abstract citizen model cannot possibly take account of political, moral and social differences, and therefore, it remains elusive. He argues that our current punishment paradigm is based on a misunderstanding of Kant's work. This potential misinterpretation of Kant is referred to by one critic³⁸ as a 'Kanticism' – a type of preaching, a legal catechism loosely based on the retributive Kantian ideal and founded on a simplified

³⁶ Marty Slaughter, 'Sublime Mercy', *Law, Culture and the Humanities*, 2010 Vol 6 p.436–454.

³⁷ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press 2000).

³⁸ Linda Ross Meyer, *The Justice of Mercy*, (University of Michigan Press 2010) p.3.

understanding of Kant's theory of morality and law. The problem, as Norrie maintains, is that this 'juridical individual'³⁹ cannot be expected to conform to legal norms, as this approach does not take account of the many political, moral and social factors which make us human. Norrie questions the ideal of the universal subject – that is to say a State-created 'juridical individual' on the grounds that the notion creates a 'simulacra of morality'⁴⁰ which fails to account for the political and economic reality of the criminal offender.

This is a false idea of the rationale for good behaviour of citizens, a 'simulacra' since it is an ideal representation of the relationship between state and individual, and furthermore a false representation of the nature of individual agency and reason. What it does instead is to conceal the reality of that individual's very nature, which must be influenced by his own experience and by the political and economic environment in which he lives. Norrie concludes that this leads to confusion and irrationality in the criminal law and elsewhere. The consequence of relying on this concept of the juridical individual may have led to an oversimplification of the ideal system of desert.

Alongside Norrie, I will also expose the shortcomings of the retributive ideal with particular reference to forgiveness and mercy, and will demonstrate that it may be found within the system currently in place. The solution to these inconsistencies is to stop conceiving of criminal law and punishment in Kantian terms. This view of subjecthood, or personhood, necessarily leads to inconsistencies within the law, and, ultimately to unfairness. These inconsistencies also extend to mercy and forgiveness, as personal circumstances or motives cannot be taken into account in criminal liability. Therefore, current legal structures do not allow an expression of forgiveness by a sympathetic victim or a merciful judge. I will argue that Norrie's argument can, potentially, be extended to include the possibility of a theory of forgiveness. However, I will depart from Norrie and argue that law's failure to account for forgiveness and mercy does not just arise from a failure to acknowledge the political

³⁹ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Butterworths 2001) p.223.

⁴⁰ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press 2000) p.5.

and the social, but also the ethical. Here, I will address Linda Ross Meyer's argument that reason need not be the ground for morality, and that a different paradigm would, potentially, allow for mercy and forgiveness.

Meyer suggests the idea of 'being-with-others' as a replacement of the Kantian ideal. She argues that merciful judgments are only the antithesis of fair judicial decision if a Kantian view of criminal justice is accepted as a morality which forms the basis of the way that we approach the punishment of offenders. Alternatively, an ethics of law based on a Levinasian theory would allow us to 'be-with'⁴¹ the offender and at most incorporate mercy, or at least, to stop rejecting it outright. Meyer suggests instead that mercy can live in a world in which we are already 'with' others. Reason is not the given state of affairs; it is merely a derivative concept. What is primarily important is an ethics of community. Community precedes reason as the grounds for morality. Meyer uses the term drawing on Heidegger and Levinas. She argues, essentially, that if reason is not accepted as the grounds of all morality, then we can begin to accept a position in which mercy might be possible, because the usual arguments against mercy no longer hold true:

Heidegger and Levinas both turn the traditional antagonism between law and mercy on its head. For both, the relationship with others is a given, an 'always-already', not something which is mandated or mediated by the logic of treating like reasonable beings alike. This simple change holds extremely important consequences for the problem of mercy in sentencing. If we do not need reason as glue, then granting (unreasonable and undeserved) mercy may not destroy the ground of community after all but may instead reflect and recognise the lopsided risk and vulnerability that is at the heart of community.⁴²

The criminal is included in the process, and she suggests that defendant impact statements could be used in a similar way. I propose that rather than a 'being-with-others' as she suggests we can consider intersubjectivity or interconnectedness, and focus on the relationship between the offender and the offended in the context of the effect on the society of which they are all part. This builds on and extends Meyer's argument. I do not suggest that one system should replace the other, but that a place can be found even in retributive systems, to accommodate forgiveness. The starting

⁴¹ Linda Ross Meyer, *The Justice of Mercy*, (University of Michigan Press 2010) p.9.

⁴² Linda Ross Meyer, *The Justice of Mercy*, (University of Michigan Press 2010) p.26.

point is that we do not take reason as the glue of community – community is already there, we are drawn to the other. Viewed in such a way, there is a place for mercy.

In this chapter, I will also return to some of the themes raised in Chapters 2 and 3. I will outline some practical suggestions for the inclusion of forgiveness, along with some arguments for the use of the compassionate emotions.

The closest approximation of forgiveness in practical use in the UK is in the restorative justice model of dealing with offenders. In Chapter 5, I will discuss forgiveness in restorative justice. It will be argued that, in fact, because restorative justice keeps forgiveness as on the sidelines, it does not go far enough. In restorative justice, the traditional model of the adversarial criminal justice system is reformulated to include community values and the effect of the crime on all parties with a view to reconciling victim and offender. The role of reconciliation and apology is therefore discussed in this chapter. In many respects, restorative justice still represents retributive punishment in many respects. I will examine particular examples of restorative practices. One of these is John Braithwaite's reintegrative shaming theory⁴³, which holds that shame does not need to have negative connotations. As Valier notes

Braithwaite insisted that if event and perpetrator were to be uncoupled, the identity of the actor as a good person could be communicated to them....he believed that reintegrative shaming could produce interconnectedness between parties, and also be a catalyst to community problem solving.⁴⁴

I explained earlier that the punishment model of desert punishes both the moral evil of the offence and the harm caused. Braithwaite's theory would allow for a sort of forgiveness of the crime without giving up on the offender. However, as I will show in Chapter 5, restorative practices probably do not go far enough in this, and tend to focus on the victim's needs.

Valier shows that restorative justice has been criticised for emphasising community, whilst still retaining retributive aspects, and even more for the power dynamic which

⁴³ John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989).

⁴⁴ Claire Valier, *Crime and Punishment in Late Modernity, in Theories of Crime and Punishment* (Longman 2002) p.184-185.

exists between offender and victim. As such, it remains ‘profoundly conservative’⁴⁵. I will explore this, and agree. As an alternative, I propose that what is needed is not a shift to a communitarian philosophy but an alternative theoretical paradigm, which avoids these criticisms.

In Chapter 6, I will argue that in fact criminal law and punishment dislike mercy, but they also portray it. It is therefore hidden from view. I will also suggest through the analysis of UK case law, the way in which this discretion (that is, the discretion to forgive) is used more frequently than it might have been expected, and that the emerging influence of victims’ rights could be used to change the structures and strictures of a system in which there is little or no interconnectedness. Furthermore, the victims’ rights movement provides a perfect opportunity for courts and legislators in sentencing guidelines to allow room for forgiveness and mercy. The use of certain criminal defences seems to allow for mercy. This paves the way for a consideration of how law may not *in practice* sideline mercy and forgiveness, and provides an example of how an alternative view may be possible.

The jurisprudence of compassion and the role of the emotions, a relatively unexplored area in law, will be discussed. I will propose that the concepts of compassion and interconnectedness may provide a way to allow the prospective use of emotions in criminal law.

In Chapter 7, an applied example of interconnectedness will be discussed in the philosophy of uBuntu⁴⁶. I will consider the origins of this philosophy and the arguments that claim it can be compared to a kind of equity. If so, mercy and forgiveness may have a place. Could notions of uBuntu be applied to a Western system, or is this philosophy too intricately bound in African cultures and the particular issues faced in rebuilding a country after decades of division? Archbishop Tutu’s statement that my humanity is bound up in yours, and Mandela’s declaration that oppressor and oppressed are both in need of help, are relevant to this discussion:

⁴⁵ Claire Valier, *Crime and Punishment in Late Modernity*, in *Theories of Crime and Punishment* (Longman 2002) p.184-185.

⁴⁶ I have adopted Drucilla Cornell’s spelling of uBuntu throughout this thesis.

I knew as well as I knew anything that the oppressor must be liberated just as surely as the oppressed. A man who takes away another man's freedom is a prisoner of hatred, he is locked behind the bars of prejudice and narrow-mindedness. I am not truly free if I am taking away someone else's freedom, just as surely as I am not free when my freedom is taken from me. The oppressed and the oppressor alike are robbed of their humanity.⁴⁷

Drawing on Professor's Cornell's work on dignity jurisprudence and uBuntu, I will show that this philosophy provides a useful example of how forgiveness can be incorporated into legal structures. Whilst there are no easy answers, theoretical concepts such as uBuntu, and being-with-others might be able to inform our understanding and development of criminal justice policy in a landscape, which even now tries to recognise that victims of crime cannot only have a role as witness for the prosecution, and that the responsibility to one another also extends to perpetrators of criminal offences. In an Ubuntu philosophy the responsibility of the individual is always to others, even though through this he retains his singularity. As Cornell argues, Ubuntu does not entirely reject a Kantian view of the individual. This point will be developed in Chapter 7.

In Chapter 8, I will draw these themes together. Using an extra-legal document, the play, *The Long Road*, which describes the trauma felt by a family in the aftermath of a violent crime. The tension between forgiveness, and the paradigm of Kantian justice are symbolised and demonstrated in the development of this play. The aim of this thesis is to discover whether forgiveness and mercy can be located in criminal punishment. I will come to the conclusion that there is evidence of forgiveness and mercy at work, both in the criminal defences and in criminal sentencing. This is not well articulated and is frequently confused with leniency and mitigation. The long debate over mercy oscillates between mercy being a part of justice, and separate from it. I will show that it need not be excluded, but can season it, if it is only recognised. Victim forgiveness, too, can find a place in the criminal trial. In terms of a philosophy, an alternative lens, using Levinas, can be used. However, we must stop insisting that forgiveness lies in either the private domain *or* the public sphere, but realise that a hybrid approach may be possible.

⁴⁷ Nelson Mandela, *The Long Walk to Freedom*, (Little, Brown & Co 1994) p.495.

1.5 Scope and Methodology

It will be appreciated that the literature on forgiveness and mercy and its role in criminal justice is vast. These concepts span law, theology, psychology and philosophy. Arguments on the relationship between mercy and justice have pre-occupied legal philosophers for centuries. There are advocates of forgiveness in nearly all disciplines. In this thesis, I have chosen to concentrate on the shortcomings of the retributive or desert model of punishment, and the place of mercy within it. In terms of forgiveness, I have chosen some of the philosophical themes which appear to me to be pertinent to the above discussion on the nature of retributivism. I do this through my readings of critics of Kant's moral philosophy, in particular, Alan Norrie, and Linda Ross Meyer. Thus, I will concentrate on whether forgiveness can be given freely, or whether it ought to have conditions attached; the role of remorse, the distinctions between mercy and forgiveness in the criminal law. Most importantly, it will be necessary to discuss how the law sees the person who has offended: the criminal subject. In this regard, I have examined Kant, Levinas and the dignity jurisprudence of Drucilla Cornell. I will argue that the type of forgiveness to be acknowledged is not uniform. It means different things to different victims, to different offenders. In this way, Meyer's philosophy helps to a degree. The process of forgiveness may be performative (the language of forgiveness is a start).

I have also chosen to use an extra-legal document, a piece of literature, the play *The Long Road*⁴⁸, by Shelagh Stephenson, which demonstrates many of the tensions raised in the problematic of forgiveness and mercy in the criminal law. The play demonstrates the difficulty of trying to find an easy solution in the aftermath of trauma. Anger and forgiveness are present in equal measure. Once the process of forgiveness has started, the protagonists find it hard to achieve, but equally hard to dismiss. Forgiveness, therefore, is not a linear process. The complicated nature of forgiveness is explored below. This is the idea of forgiveness which I wish to explore in this thesis. It will be fully discussed in Chapter 2.

⁴⁸ Shelagh Stephenson, *The Long Road* (Methuen Drama 2008).

1.6 A literary approach

In the play, the protagonists deal with the aftermath of a random, violent crime. The play seems to demonstrate some of the themes explored above. The play is the work of the Synergy Theatre project which works with prisoners and ex-prisoners through theatre towards rehabilitation. One of the main aims of the organisation is to raise awareness of issues affecting the criminal justice system. The play was also supported by The Forgiveness Project⁴⁹. The play concerns a family whose son, Dan, is fatally stabbed one evening. It explores the effect on the family as a whole and specifically the fact that Mary, Dan's mother comes to be interested in the idea of forgiveness in an effort to try to come to terms with what has happened. She reaches this point because she can no longer ignore the presence of the deed and its perpetrator in the lives.

John and Mary's eldest son, Dan, has been murdered for a trivial reason in an act of senseless violence, by Emma, a troubled and disaffected eighteen-year-old girl.

Mary, Dan's mother reacts initially with feelings of vengeance but finds she cannot ignore the offender. Instead, she is fascinated by her. Utterly devastated by Dan's death, it is all that the family can do to get through each day. Mary, his mother, seeks to understand why Emma has done what she did, whilst her husband John cannot bear to even speak her name. Mary persists however and ultimately finds some relief in making contact with Emma. Curious, as she is, she wants to meet her, a decision that cannot be accepted by her husband or her other son, Joe. Eventually, this meeting is facilitated by Elizabeth, a prison visitor.

The play focuses on Mary's emotional road to forgiveness, from an initial hate and disbelief through to curiosity about Emma, and ultimately, to an acceptance of her unerring presence in their lives. The process of forgiveness is not an easy one, and takes time:

I thought when I started all this that all I had to do was say I forgiven you, and the healing would start. But I can't say it. Yet. Not truthfully anyway. It's a long road, I

⁴⁹ www.forgiveness-project.org.

understand that now. Sometimes I feel forgiveness and sometimes I don't. Sometimes I wake up in the morning and for a split second, I forget that Dan is dead. And when I remember, it's as new and harsh and overwhelming as it was on that very first morning. And I don't feel full of forgiveness and love, I feel full of despair and anguish and fury at the person who did it. Forgiveness wouldn't make the grief go away. That's what I've learnt... so I'm groping along in the dark, as best I can.⁵⁰

It is also a complicated one:

I have to hold the two things side by side in my hands: the ordinary girl, the terrible thing. Because I think they're both true.⁵¹

The characters in the play can be seen as symbolising the tensions in the criminal justice system. Like John, we see offenders as a breed apart:

I'm not interested in people in prison, they've nothing to do with me, they're criminals, they've wrecked people's lives and I refuse to think about them. Why did I think I could take the pain away? The only time it goes away is when briefly for a moment, I imagine shooting her...⁵²

John represents the traditional, retributive system of punishment, the *lex talionis*, an eye for an eye. Mary is prepared to see beyond this and is willing to consider meeting Emma, and whilst she is not offering Emma easy forgiveness, neither is she prepared to consign her to a place of forgetting. How can we reconcile these two responses to crime? Is forgiveness so rare that it should remain at the sidelines of the system, an adjunct to justice? Or is it possible to acknowledge that traditional views of criminal justice are changing, and that victims wish, for better or worse, to have their views heard? The play demonstrates the difficulty of these issues, and the dichotomy of the retributive desert-based, even vengeful system of justice, along with the reality of a victim who wishes to understand, if not immediately to reconcile and forgive. The subjecthood of the offender, as well as the victim, cannot be ignored; nor can the emotions of both participants in the justice system. Even post-punishment, criminal law can find a way to accommodate forgiveness and mercy, in circumstances where a victim of crime wishes to express it. It can also accommodate those who do not. The nature and flavour of the criminal justice system can potentially be altered. Instead of

⁵⁰ Shelagh Stephenson, *The Long Road* (Methuen Drama 2008) p.56.

⁵¹ Shelagh Stephenson, *The Long Road* (Methuen Drama 2008) p.57.

⁵² Shelagh Stephenson, *The Long Road* (Methuen Drama 2008) p.24.

a Kantian system which places emphasis on individuality and reason, and a State-centered justice system in which a victim has little voice, an alternative may be sought.

In this chapter, I have presented the argument that will be developed over the rest of this thesis. That argument may be summarised as follows. Criminal law and punishment, in its traditional adversarial form, does not acknowledge mercy and forgiveness. This is because it is based on a Kantian interpretation of morality which is based on two key principles: that of the autonomous, legal subject who has entered into the social contract and secondly, on the idea that moral duty is based on reason alone. Part of this contract is an agreement that one who commits crime, who transgresses, will be punished by the State. The State here represents the citizens. This has an important implication. The *private* citizen has no say in punishment. To allow this would be to compromise the impartial, cool-headed decision of a State-appointed judge. Punishment is carefully calculated to be just. There is a delicate balance between the imposition of punishment and the acceptance of it. This is of a contractual nature. Any use of mercy or forgiveness upsets this balance. Drawing on Norrie's critique of Kant, I will show that there are contradictions in our treatment of mercy. In particular, a judge who allowed himself to be swayed by emotion or pity for the defendant is seen as not being capable of making a fair decision. I will locate mercy and forgiveness in the law and in extra-legal contexts. I will show that judges do exercise mercy, and will show that victims wish to express it. Restorative justice practices encourage it too. However, these examples show that despite clear evidence of it being at work, it remains unacknowledged, and when it is exercised, this is done in a very limited way, which often shows contradictions. Forgiveness, which belongs in the private sphere, it will be argued that the exclusion of the victim from the criminal trial is no longer realistic. This view is supported by the emergence of legislative provisions that highlight the importance and respect that needs to be accorded to victims in the criminal trial. The use of emotions in legal decision-making cannot be ignored. In restorative justice, evidence of forgiveness can be found, although it will be seen that it still has retributive elements. I will demonstrate that in criminal defences, some of them come very closely to mercy, but only a few are explicit in the use of it. In particular, the emotion of compassion is closely related to forgiveness. This concept is becoming more prominent in legal definitions and

guidelines.

Alongside Linda Ross Meyer, I will argue that objections to mercy and forgiveness are only valid if we accept that a Kantian view is the way to approach morality. Instead, we can adopt a stance of 'being-with-others'. Furthermore, we can take inspiration from other philosophies of law, such as uBuntu. On this basis we can argue that the subject is no longer an autonomous legal subject but is interdependent. I will develop this idea through the uBuntu literature, in particular, through Cornell. If forgiveness is to be recognised as more than a private whim, a theoretical justification is necessary. It will be argued that inspiration can be drawn from the practice and policy of uBuntu that gives rise to an understanding of the criminal subject as being interconnected rather than individual. I will conclude that the private sphere of forgiveness and the public sphere of mercy are no longer dissociable. Mercy can be found, but must be articulated. Forgiveness, too, is present, but the ways in which it can be expressed are limited. Various practical solutions can be implemented to improve this. Finally, retributivism need not be entirely rejected to achieve this, although we can learn from other models of justice.

The particular view of forgiveness used in this thesis is not a static one. I wish to demonstrate that the road to forgiveness is a long one with no easy answers. However, the consequences of not recognising it as a tool for reparation and a response to crime may mean that both offenders and victims are denied great possibilities. Perhaps, the best that can be hoped for is a *start* on the road to forgiveness, even where it should not, or cannot, be bestowed in full. Forgiveness, in other words, cannot be ignored. In the next chapter, I elaborate on this interpretation of forgiveness.

2. FORGIVING JUSTICE?

This is our world of legal justice, all form, no colour; black and white; yellow tones and grey men, a world leached of all the colour and critique of forgiveness and mercy.⁵³

In Chapter 1, we saw how mercy and forgiveness have the potential to appear in the criminal process in two distinct ways. Mercy is hidden from view, but is nonetheless exercised in the form of lenient sentencing and criminal defences. In restorative justice, victim forgiveness is acknowledged as a possible outcome of the process, in a limited way. This restriction on mercy and forgiveness is in place because it offends principles of fairness and proportionality, which are central to the criminal trial. According to these principles, we cannot treat one offender differently from the next, even if his personal circumstances are different. The criminal subject is to be viewed in an abstract way, without recourse to his personal circumstances, because it is important that all offenders are treated in exactly the same way. To do otherwise, by, for example, allowing a victim to express forgiveness, would be to compromise the objectivity of state punishment, and of the judges who represent it. In victim personal statements, a victim may express forgiveness if they so wish, but these are kept clearly separate from the sentencing process. The emotions, whether compassionate or vengeful, have no place in the criminal trial, and they should not influence the sentencing judge.

This thesis will argue that mercy can be found in many forms in criminal law, but that it needs to be articulated. There ought to be an outlet for a victim to express forgiveness in the criminal trial, and that it is naïve to suppose that such a statement cannot influence a judge. Judges, after all, have to balance many mitigating or aggravating factors at the sentencing stage. I will be arguing later in this thesis that not only can we find mercy at work in the public sense of sentencing and pardons, but that the court's approach of excluding expressions of forgiveness on the part of a victim is becoming outdated. The position of victims in the criminal trial is gaining in prominence, so too might any expressions they wish to make to a court. The role of the emotions generally needs to be recognised in legal decision-making.

⁵³ Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007) p.65.

I will argue that aspects of forgiveness and mercy could be used in the criminal justice system, without a wholesale rejection of retributivism. Forgiveness and mercy, as we shall see, can both take place despite punishment. I may, as a victim, feel moved to forgive you, even if you are serving time for burgling my house. The most I can do at present is meet you during a restorative encounter though forgiveness will be sidelined, or confused with reconciliation. I can make a statement at trial, which the judge is not allowed to take account of when sentencing. As a sympathetic judge, I may want to reduce your sentence if you have shown remorse, or your personal circumstances move me to do so. At present, it is not clear whether this is a recognition of mitigation, or a display of mercy. Therefore, in order to achieve a better articulation of mercy and forgiveness, it may be necessary to adopt a different perspective of the criminal subject. This perspective would reject the claim of Kantian criminal law that mercy and forgiveness have no place in a system based on reason and the central position of the autonomous abstract legal individual. In order to analyse this new approach, it is important to understand how mercy and forgiveness can be understood currently, from a philosophical standpoint. This will enable us to locate them, to the extent that this is possible in criminal law and punishment.

In Chapter 1, I referred to the difficulty of choosing definitions of forgiveness from such a vast literature. These terms extend over criminal and civil law (we can observe for example the idea of a merciful judge in a criminal trial or the idea of debt forgiveness), religious and secular life, and moral and legal philosophy. I have therefore chosen some interpretations of forgiveness which seem useful to allow me to unpick the place of mercy and forgiveness in the criminal process. In this chapter, I will tackle some of the many terms used to describe the idea of forgiving, and provide a definition of my own. This is because, if we are to assess the place of forgiveness in the criminal process, it is important to understand what *kind* of mercy or forgiveness we are trying to locate. What makes forgiveness distinct from the many other terms used to describe it? The different definitions would include political terms such as pardon, mercy, clemency and more general terms, such as acquittal, absolution, condonation and reconciliation. What is the meaning of these different terms and is it really necessary to make the distinction? My answer is that we do. As a start we need to ask whether forgiveness is freely given, or needs conditions such as apology. In the end, it may be that forgiveness is a different thing for each person who wishes to use

it. The usual response to such a claim would then be that it cannot, then, be accommodated in law. However, if the expression, rather than the deed, or the fact of forgiveness is what is important, then it can still be individuated. Its *expression* can be given court time. It may be enough to say that you forgive. The process, the long road, may take longer.

Sarat and Hussein describe the difficulty inherent in trying to find definitions:

we are often left with an incomplete understanding of what we mean and do when we speak of forgiveness, mercy and clemency. Are they different names for a single thing? Do they name attitudes or actions? Are they directed at people or the things people do? Can we have one without necessarily bringing the others along?⁵⁴

As explained in Chapter 1, one of the reasons for the exclusion of mercy and forgiveness lies in the fact that the State takes on the role of administering justice. The distinction between public and private forgiveness is, therefore, an important one. The criminal justice system may exclude forgiveness, but we will see that in fact forgiveness shows itself in various guises in the public domain. This implies that all systems of law need forgiveness, or some sort of equity to redress the harshness of the law. Judges may exercise mercy in their public role, and victims may do so privately. The first important distinction, as explained in Chapter 1, is between public mercy and private forgiveness. Mercy and clemency are political, legal actions, whereas forgiveness is an individual choice, which need to have no influence on the trial or sentencing process. It can be described as a personal change of heart⁵⁵. They are ways of *reducing or eradicating* a deserved legal penalty, usually on the grounds of the personal circumstances of the offender. There is no right to merciful treatment, but a judge or other adjudicator may allow it in certain limited circumstances. As public justice has come to be represented by deterrence and retribution rather than reconciliation, mercy has lost its place and definition. This is due, in part, to the evolution of retribution and desert as the classic response to criminal behaviour from a place in which 'crimes' were individual disputes to be resolved privately, to a place in which 'crime' is administered by the State under the authority of the sovereign. The former was much more sympathetic to mercy, as harm done could be pardoned

⁵⁴ Austin Sarat and Nasser Hussein, *Forgiveness, Mercy and Clemency* (Stanford University Press 2006) p.1.

⁵⁵ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988).

directly by the person affected. State punishment required a much more objective stance, distanced from the personal emotions.

2.1 Mercy and the 'blow' of justice

I showed in Chapter 1 that mercy and justice are often set against one another. To be just means to be fair, and to treat all offenders equally. Treating an offender differently due to his personal circumstances is to be automatically unfair to others who do not have the same set of circumstances. Norms of law and punishment require that judges detach themselves from the particulars of the case. In this way, the defendant is treated abstractly with no personal attributes. This in part makes judging easier. At the same time, judges have discretionary powers in many areas of law to enable themselves to vary in their decisions according to the facts of the case.

This is the dilemma presented to us by mercy. Mercy is the opposite of justice – it represents a whim, arbitrariness, and does not treat like cases alike. On the other hand, as we can see in the quote to the previous chapter, mercy seasons justice – makes it better, makes it nobler. Mercy is a positive addition to the law, resulting in 'better' justice. It is, if bestowed, rooted in sympathy that the individual judge may have for an offender, on compassionate grounds. These grounds may be connected to the offence committed, in the sense that he may have suffered enough already, or it may pertain to the offender's particular personal circumstances, such as illness.

Slaughter describes the dichotomy:

justice that is simply the operation of law – legal justice – is an essence, a totality given to maintaining its self enclosure. It has no underside and forecloses any relation with mercy or the ethical. It is 'justified' in the sense that it is rational, orderly, right and rigid. There are no exceptions, no anomalies; nothing interrupts its harmony or form. ...on the other hand, love and mercy lie beyond this beautiful totality of legal justice.. they are singular and operate as unjustified exceptions, neither justifiable nor rational.⁵⁶

The quote at the start of Chapter 1 demonstrates this tension well. In the Merchant of Venice, Portia's plea to Sherlock to the Duke of Venice for mercy for Antonio appeals

⁵⁶ Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007) p.52.

to a higher sense of nobility in a good judge. Antonio, in debt to Shylock, will have to pay with 'a pound of flesh' if he cannot repay the loan on time. In this context, mercy is seen as a virtue to which a lawmaker or lawgiver would aspire. For Shakespeare, mercy is a virtue, or a divine gift, bestowed by a sovereign. It works both as the opposite of justice and as a necessary adjunct to it, which is of benefit to both the giver and the receiver. This emphasises mercy's qualities as a gift, given freely, without any sense of obligation.⁵⁷

This type of mercy can also be observed in *Measure for Measure*, which followed the Merchant of Venice. Famously, Angelo, in charge of Venice in the Duke's absence, arrests and convicts Claudio for fornication with Juliet. When Claudio is condemned to death by Angelo who is exercising his legal right, Isabella, Claudio's sister, begs Angelo to spare Claudio's life. Her dilemma, caused when Angelo presents her with an impossible choice— sleep with him or Claudio will die, is symbolic of the tension between mercy and justice. Mercy, here, is very clearly a matter for the emotions and the heart, not the application of logic and strict legal justice. It also demonstrates that mercy and forgiveness is not an easy choice. For Isabella, there is an internal dilemma of conscience in her request to Angelo, when she sees mercy as:

a vice that I most do abhor, and most desire should meet the blow of justice, for which I would plead but that I must, for which I must not plead but that I am at war 'twixt will and will not.⁵⁸

The view of mercy as a beneficial adjunct to the strict law is not in keeping with norms of contemporary justice. A judge who shows mercy, is, for Murphy, playing a dangerous game. He is not entitled to use mercy on behalf of the State:

a judge who is influenced simply by the plight of the offender before him may lose sight of the fact that his job is to uphold an entire system of justice that protects the security of all citizens.⁵⁹

⁵⁷ Jeffrie G. Murphy and Jean Hampton, *'Forgiveness and Mercy'* (Cambridge University Press 1988). p.166.

⁵⁸ William Shakespeare, *'Measure for Measure'* (Act 2 Scene 2, 29-33) in Stanley Wells and Gary Taylor (eds) *The Complete Oxford Shakespeare*, (Guild Publishing 1998) p.787.

⁵⁹ Jeffrie G. Murphy and Jean Hampton, *'Forgiveness and Mercy'* (Cambridge University Press 1988). p.168.

The bestowing of mercy on sympathetic grounds will emerge in Chapter 6. I will argue that compassion, sympathy and empathy are closely tied to forgiveness, and are becoming increasingly recognised as part of the legal definitions of crime. Compassion, for example, is recognised in prosecutorial guidelines to be applied in cases of ‘mercy killing’⁶⁰. This is not, of course, in terms of compassion towards the offender, but in terms of compassion shown *by* the offender. What it does show is that compassion may be incorporated into legal principle and even, at some stage be considered to be part of the substantive criminal law in the form of a defence of compassion.

The contradictions of mercy were outlined above. On the one hand, mercy is a discretion, which a judge may choose to exercise on the grounds of sympathy or compassion for the offender’s plight. This, as Shakespeare implies, ennoble the judicial position, and is a necessary adjunct to the strict application of legal rules. On the other hand, it is regarded as a dangerous addition, to be avoided at all costs.

For Murphy:

if we simply use the term mercy to refer to the demands of justice then mercy ceases to be an autonomous virtue, and becomes part of justice. It thus becomes obligatory, and all the talk about gifts, acts of grace... and compassion suddenly becomes beside the point. If on the other hand, mercy is totally different from justice and actually requires that justice sometimes be set aside, it then counsels injustice.⁶¹

For example, Duff sees mercy as an intrusion⁶² to the system. Claudia Card⁶³ and Alwynne Smart argue, on the other hand that it is not in fact in contradiction to the retributive ideal of criminal punishment. In terms of the philosophy of forgiveness, it may be argued that mercy *can* be tolerated in a system of desert and retribution. Essentially, mercy is something that, according to Claudia Card (a supporter of a retributivist system of punishment), forms part of a just decision, where the defendant deserves it, perhaps due to personal circumstances.⁶⁴ Smart goes further, arguing that

⁶⁰ Term used for a homicide motivated by the defendant’s mercy for the victim’s suffering, for example in cases of severe terminal illness.

⁶¹ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.169

⁶² Anthony Duff, ‘The Intrusion of Mercy’, *Ohio State Journal of Criminal Law* (2007) Vol 4, 461.

⁶³ Claudia Card ‘Mercy’, *Philosophical Review* 81 (April 1972) p.182-207.

⁶⁴ Claudia Card ‘Mercy’, *Philosophical Review* 81 (April 1972) p.182-207.

justice is not possible without some mercy - in carefully defined and limited circumstances. I agree that judicial discretion in mercy must be better articulated, but not necessarily at the level that Smart requires.⁶⁵ Card understood mercy as an expression of justice, a perfection of justice⁶⁶. Tempering justice with mercy is even more just. We will see in Chapter 3, that Jeffrie Murphy entirely disagrees. 'Tempering', he says, means 'tampering':

if mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice. (Temperings are tamperings). Thus to be merciful is perhaps to be unjust. But it is a vice to be unjust. Thus mercy must be, not a virtue but a vice.⁶⁷

In other words, the perfection of justice, the seasoning of justice by mercy, is just a way of interfering with mercy. For Card, however, mercy, as an 'ethic of charity', is an effort by the more fortunate to compensate the less fortunate for undeserved suffering, whilst not necessarily compromising the idea of justice. Mercy is a virtue shown by judges when they mitigate to ensure that legally permissible punishment does not exceed the amount of suffering the wrongdoer deserves – a bit like equity and legal justice.

Card's view of mercy does not conflict with a retributive view of punishment – in being merciful; we reduce or withhold a penalty which was initially thought to be justified at least in part on the basis of the offender's desert for having committed the offence. It is only in these circumstances that mercy would be justified – in fact; there would be an obligation to exercise it. Mitigation is not and should not be part of this process; instead they are part of the normal sentencing process:

mercy ought to be shown to an offender where it is evident that otherwise he would be made to suffer unusually more than the whole, owing to his peculiar misfortune, than he deserves in view of his basic character and he would be worse off in this respect than those who stand to benefit from the exercise of their right to punish him or have him punished.⁶⁸

⁶⁵ Alwynne Smart 'Mercy' in *The Philosophy of Punishment*, ed. H.B. Acton (St Martins Press 1969) p.212-27.

⁶⁶ Claudia Card, 'On Mercy' *Philosophical Review*, vol 81 p181-207.

⁶⁷ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.167.

⁶⁸ Claudia Card, 'On Mercy' *Philosophical Review*, vol 81 p181-207.

This type of mercy is there to compensate for the inequities of fortune.

mercy may be seen as an attempt on the part of the more fortunate to compensate the less fortunate for their greater undeserved suffering, when a significant part of that suffering is due neither to injustice in the laws nor the fault of the offender himself by imposing less than the deserved punishment which they have a right to exact for the offences of the latter.⁶⁹

Smart holds that there are various conditions for mercy of this type. Mercy is usually unjust or it would not be mercy. When a judge acts mercifully, he has already decided on a deserved penalty. The choice to be merciful is a choice to be unjust, effectively. This 'injustice' means a penalty, which is not deserved, plus injustice relative to other wrongdoers. On a reading of Smart's conditions⁷⁰, I find that these are conflated with mitigation, as we know it now. A sentence can be mitigated on the grounds of illness, youth or where there is evidence of genuine remorse. This latter point is true both of mercy and mitigation.

Duff also argues that sometimes mercy is relevant to the criminal law, but must be seen as an intrusion, rather than part of the law or compatible with legal principles. This may happen as a result of the offender's present suffering, or his past history. This is not to say that mercy destroys the criminal law's claim to principled rationality.

He focuses, however, on the sentencer who is moved by compassion. In his view, most problems needing mercy can actually be solved as a matter of judicial discretion:

the legal rules that define offences and prescribe sanctions to them can fail as rules so often can, to do justice to features of the individual case that do properly bear either on the seriousness of the particular instance of the offence or on the defendant's culpability.⁷¹

Therefore, he objects to mercy on the grounds that mercy is unfair to those who do not receive it. We will see, however, that Meyer and other theorists have an answer to this. It only presents a problem if a Kantian view of criminal law is accepted.

⁶⁹ Claudia Card, 'On Mercy' *Philosophical Review*, vol 81 p181-207.

⁷⁰ Alwynne Smart 'Mercy' in *The Philosophy of Punishment*, ed. H.B. Acton (St Martins Press 1969) p.212-27.

⁷¹ Anthony Duff, 'The Intrusion of Mercy', *Ohio State Journal of Criminal Law* (2007) Vol 4, p.364.

For Duff, ultimately:

mercy is a matter of reason: a sentence who shows mercy is responding to reasons that make leniency appropriate...but the realm of practical reason is..a realm of rational conflict: the claims of mercy conflict irredeemably with the demands of justice. That conflict is rational, in that it is a conflict between sets of reasons each of which have proper claims on us as agents; but it does not always admit of rational solutions that leave no moral remainder of legitimate but unsatisfied claims. Justice is not served by mercy, but sometimes it is properly defeated by mercy.⁷²

He argues, in the context of a discussion on the release of Abdelbaset Al-Megrahi convicted of the Lockerbie bombing, on merciful and compassionate grounds, that surely there must be room for mercy in a civilized system of criminal justice.⁷³

Any argument for mercy, according to Duff, cannot be just if it fails to impose on an offender the punishment that he deserves. We punish on the ground that in a legitimate system of law, the courts are acting not only on behalf of the victim, but also on behalf of the political community. He sees, however that mercy might be justified in another way. In punishing the offender, we require of him that he 'concentrate his mind' not on his own affairs, but on those of his victim and what his victim has suffered. This justification is especially true in the case of imprisonment. By exercising mercy, we are allowing the offender to focus again on his own affairs (for example if his wife is terminally ill). This would be an instance of appropriately exercising mercy and would depend on the seriousness of the offence. We cannot, seriously say to a repeat, serious offender that we are prepared to put aside his crime in these circumstances. This applied to Al- Megrahi

to release him was to allow a merciful impulse to override, rather than appropriately to temper, the demands of justice.⁷⁴

This would suggest that mercy is only available in certain personal circumstances, for certain types of offender. This is the limit of Duff's contention, as it does not allow for the possibility (theoretically, as there was none here) of victim forgiveness and

⁷² Anthony Duff, 'The Intrusion of Mercy', *Ohio State Journal of Criminal Law* (2007) Vol 4, p.387.

⁷³ Anthony Duff, Justice, Mercy and Punishment, *Criminal Justice in Scotland*, 2010 < http://www.cjscotland.org.uk/index.php/cjscotland/dynamic_page/?id=77> accessed 10 June 2014. p.3.

⁷⁴ Anthony Duff, Justice, Mercy and Punishment, *Criminal Justice in Scotland*, 2010 < http://www.cjscotland.org.uk/index.php/cjscotland/dynamic_page/?id=77> accessed 10 June 2014. p.4.

appears to limit mercy to the defendant's personal circumstances. It also presumes that the basis of punishment is Kantian reason - in particular the assertion that desert is the reason for punishment. This as we shall see, can be questioned.

Lindsay Farmer⁷⁵ disagrees with Duff's account on the following grounds. Firstly, it implies that there is no room for mercy, which she defends as a virtue. It is, simply, the right thing to do. She calls the position of mercy in the criminal justice system puzzling and paradoxical – something which once was an equitable decision, has now become legally viable through mercy granted by the executive, in Al-Megrahi's case. She agrees that law cannot demand justice, so there can be no duty to exercise it. This is a contrast to the Kantian duty to punish. In response to Duff's assertion that in failing to punish we are not only doing a disservice to the victim but to the entire community, she says that mercy can take place before punishment has ended, in a temporal sense. It remains external to the imposition of punishment, in other words. Mercy should be done *because it is the right thing to do*.

the exercise of mercy or compassion requires that we do what is appropriate or right in the circumstances, not according to the measure of what is just, but according to our compassion or ability to recognize the right of the other.⁷⁶

Rather than distinguishing between types of defendant, she argues that mercy must always be present, on a different measure to justice. It is, instead,

the recognition of the individuality or humanity of the other person and the sense of compassion for their situation.⁷⁷

In reply, Duff links mercy to equity, then to justice. He claims that this situation is not a matter of mercy, but of judicial discretion. What is needed is a kind of criminal equity to vary a defendant's circumstances when his personal circumstances dictate it. This would include the discretion not to prosecute e.g. in assisted dying cases. This

⁷⁵ See generally, Farmer, L., 'Mercy and Criminal Justice: a reply to Anthony Duff', *Criminal Justice in Scotland*, 2010 http://www.cjscotland.org.uk/index.php/cjscotland/dynamic_page/?id=77> accessed 10 June 2014.

⁷⁶ Farmer, L., 'Mercy and Criminal Justice: a reply to Anthony Duff', *Criminal Justice in Scotland*, 2010 http://www.cjscotland.org.uk/index.php/cjscotland/dynamic_page/?id=77> accessed 10 June 2014. p.3.

⁷⁷ Farmer, L., 'Mercy and Criminal Justice: a reply to Anthony Duff', *Criminal Justice in Scotland*, 2010 http://www.cjscotland.org.uk/index.php/cjscotland/dynamic_page/?id=77> accessed 10 June 2014. p.3.

still falls, for Duff, within the scope of the desert principle of punishment. In this situation, the demands of justice might be tempered by a sense of compassion. The role of this emotion, and its relationship with forgiveness and the law is discussed further in Chapter 6. This is an exercise of the private nature of forgiveness, which was introduced in Chapter 1.

Although for some, merciful judgments are compatible with retributivism, they remain a reduction in punishment, which can only be made by a legal official. A victim cannot be merciful, as it is not the role of the victim to inflict punishment. Duff further argues that forgiveness can only be possible where the victim has 'standing' – and where it is given. So, no forgiveness can be given on behalf of a murder victim for example. The voice of the victim can add this 'anger' in the form of victim impact statements. These are, he suggests, therapeutic for the victim, but they do carry the dangers of 'capricious' sentencing based on luck rather than universal guides such as desert and responsibility.

Apart from the reasons given by Card and Smart, as long as justice is based on retribution, mercy has to remain on the edge of the system, or not be used at all. As it has been demonstrated in Slaughter's analysis, it is no longer part of justice, but instead competes with it. The definition of justice is to treat similar cases alike, so to be just and merciful is a logical impossibility⁷⁸. The only possible forms of mercy are: equity when strict legal rules do not allow for fairness; mercy in the form of excuses and defences; or other merciful judgments due to the offender's personal circumstances. Forgiveness resides in the private sphere and aims to re-establish peace (such as in Truth and Reconciliation Commissions), but it does not belong to public punishment (in victim-offender mediation for example). Because it cannot treat similar cases alike, mercy and justice can never be reconciled. Exercising mercy fails to treat the offender as a rational individual, so it fails to respect him. These competing views will be further developed in Chapter 4. Ultimately, I will argue that neither view is correct in its entirety. The Al-Megrahi decision highlights that a redefinition of mercy is necessary, which takes into account other factors, such as

⁷⁸ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.3.

mitigation, which are similar to mercy. That redefinition must take the best of the conciliatory nature of forgiveness, and the fairness of desert.

In a study of the historical relationship between mercy and law, Marty Slaughter describes how in past times, equity and mercy were virtually interchangeable concepts. The modern understanding of mercy as separate from law, from justice. This, as I explained earlier, is due to the split between public justice and private forgiveness.

2.2 The exclusion of mercy

I explained earlier that the 'loss' of mercy in the criminal trial was due to the enormous changes that had taken place in politics and punishment as a result of the Enlightenment. The development of criminal justice was famously documented by Michel Foucault, in his seminal work, *Discipline and Punish: The Birth of the Prison*⁷⁹. He describes the move from mediaeval punishments to the clean, precise punishment exacted by the guillotine, which certainly had no room for mercy, seen as an arbitrary power, unfairly applied. As Ammar writes:

English criminal law took a major shift with William the Conqueror. Essentially, what the new king did was to replace the victim with the State. Crimes were now considered against the State, and the offender owed, first and foremost, the State. Today, it is accepted almost without question that when someone breaks the law (criminal law) his or her primary obligation is to the State, and not to restore the broken relationship with the victim.⁸⁰

Marty Slaughter⁸¹ writes of the origins of the split between mercy and justice. Originally the two were not opposed⁸². The origin of the split is that legal justice, of course, was derived from God including the Christian narrative of compassion and forgiveness. This was passed to the sovereign, who became the agent of divine justice dispensing justice and mercy. The monarch took on the divine right (to forgive) and this is how the prerogative power of justice and mercy was born. However, mercy and justice were intertwined, very much like the system of equity in civil law today:

⁷⁹ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (trans Alan Sheridan, Penguin 1977) p12-13.

⁸⁰ Douglas B. Ammar, 'Forgiveness and the Law - A Redemptive Opportunity', 27 *Fordham Urb. L.J.* (1999) p.1590.

⁸¹ Generally, Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007).

⁸² Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007) p.53.

they formed a seamless, if mysterious and paradoxical whole...mercy was part of justice, and vice versa...equity and mercy were interchangeable terms meaning the application of Christian values of charity and benevolence to specific cases, the benign interpretation of law and compassionate consideration of circumstances which balanced out the rigour that is the strict application of the law.⁸³

Because penance was given for sin in the confessional, that was sufficient punishment, and forgiveness and reconciliation could follow. The Enlightenment, of course, saw a diminishing of sovereign and ecclesiastical power in favour of republican government and the social contract. One consequence of this was that equity, which had been similar to mercy was to become a secular concept:

equity and mercy were split apart.. a large part of what had been understood as mercy became the legal principle of equity and then gradually equity was associated with legal justice.⁸⁴

Mercy is sometimes described as a form of 'ameliorative equity'⁸⁵. In other words, it is seen as a remedy for the court to use when the strict application of legal rules would not be appropriate as the outcome would be too harsh. Equity is rarely found in the context of criminal law. However, there is evidence that it exists, if not in name, and certainly the use of mercy in judgments could be named as such.

Fortier suggests that the notion of criminal equity did exist historically, as a way for juries to allow the defendant to escape a harsh punishment; even though, as in land law and contract law, there was a separate court of equity. It was in economic, contractual and property rights that equity found its home. Nonetheless, something resembling it – a form of mercy perhaps – seemed to exist in the criminal courts. Fortier provides a comprehensive archival study of this form of equity and reaches the conclusion that even in the absence of another court to administer equitable decisions, the concept existed in the early court system. This seems really to describe the operation, especially, if it was used to reduce the harshness of a penalty. He notes that

the judge in criminal matters not only looks for the intent of the law, he also makes exceptions, expands or contracts the strict wording of the law just as he does in civil cases...alongside the blackletter criminal law, particularly with respect to these

⁸³ Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007) p.53.

⁸⁴ Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007) p.54.

⁸⁵ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.3.

crimes known as felonies, for which capital punishment was the typical penalty, there existed another process by which that black letter law was unofficially moulded, mitigated so as to keep it in line with some parallel body of norms as to what was just in the particular circumstances.⁸⁶

Fortier comments that criminal equity arose in these circumstances not only to enable judges and juries to reduce criminal penalties, but also that it had to evolve unofficially, as there was no outlet in the form of a separate court for it. He concludes that there is no concrete evidence of criminal equity.

Nussbaum sees equity as a crucial part of judging. Using the term 'epieikeia', she describes it as an

ability to judge in such a way as to respond with sensitivity to all the particulars of a person and a situation, and the inclination of the mind, towards leniency in punishment.⁸⁷

In this way, judgment must be flexible and situational, depending on the circumstances.

epikeia is a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story....the world of equity is a world of imperfect human effort and of complex obstacles to doing well, a world in which human deliberately do wrong, but sometimes get tripped up by ignorance, passion, poverty, bad education and circumstantial constraints of some sort or another.⁸⁸

This, then, is an opportunity for a judge to do the right thing and judge fairly, and not according to strict retributive principles. It is also a more realistic way of judging.

The idea of remitting punishment, then, had become a rare occurrence⁸⁹. Mercy was then increasingly seen in terms of the unfettered power of the sovereign that needed to be brought under control⁹⁰, and has become the exception to the rule, rather than an integral part of the process. Retribution came to replace reconciliation. In the secular world, the sovereign's power was beginning to be seen as suspicious. In criminal law

⁸⁶ Mark Fortier, *The Culture of Equity in Early Modern England* (Ashgate 2007) p.60.

⁸⁷ Martha Nussbaum 'Equity and Mercy', *Philosophy and Public Affairs*, vol 22 no 2 1993 p.85.

⁸⁸ Martha Nussbaum 'Equity and Mercy', *Philosophy and Public Affairs*, vol 22 no 2 1993 p.85.

⁸⁹ Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007) p.54.

⁹⁰ Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007).

especially, the emphasis was on deterrence and retribution and led to the disappearance of mercy and forgiveness:

justice was now defined as retribution, the strict application of law. Justice as retribution was the norm, mercy the exception.... justice – characteristically blindfold and holding a sword became like the self enclosure of the beautiful, mercy became its sublime, mysterious excess.⁹¹

This leaves us with the strange knowledge that despite graphic descriptions⁹² of the cruelty of mediaeval times, these times were actually more amenable to mercy than those of the Enlightenment.

The importance of mercy in law should not be underestimated. The final word, should perhaps go to Slaughter who holds:

a justice that is not tyranny is tied to forgiveness, mercy, charity and love... (It is) a gift, beyond the logic of justification and justice, it should translate into equitable judgments, ameliorate punishment and where necessary reform the law.⁹³

In conclusion, we can say that mercy is either a gift, sometimes expressed by a judge in his public role to uphold justice, which it helps to counteract the harsh application of the law when the offender deserves it. In this way, it is not, as Card sees it, incompatible with retribution and desert. On the other hand, it can be argued that because the application of mercy in this way does not treat all offenders alike, it is unfair and should not be used. This is Duff's contention. In Chapter 6, we will see that mercy is often confused with other legal constructs. Excuses and mitigation in sentencing are ways in which the judge can use his or her discretion, but which are frequently confused with mercy. These still seem to be exercised within the criminal trial, and thus, within the Kantian and retributivist system. We have seen that mercy is a casualty of the development of punishment policy, characterized by a move from criminal law as a settlement of individual disputes and restorative reconciliation to state justice and retribution. The result is that approaches to mercy suffer from inconsistency. Despite law's dislike of mercy in criminal law, and the historical reasons for excluding it from the fair criminal trial, we can observe various instances

⁹¹ Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007) p.59.

⁹² See generally Michel Foucault, *Discipline and Punish: Birth of the Prison* (Penguin 1977).

⁹³ Marty Slaughter, 'Levinas, Mercy and the Middle Ages' in Marinos Diamantides (eds), *Levinas, Law and Politics* (Routledge 2007) p.50

of it. At first sight it would appear that mercy and justice cannot be compatible at all, however, if we view mercy, as Shakespeare did, as an ennobling addition, or as Card suggests, as a perfection of legal justice, then it becomes possible. The stumbling block is the role of the judge and the importance of judicial discretion. As we will see later in this thesis, this focus on the retributive, desert approach to punishment does not allow mercy to flourish. The only area in which it might be said to be revived is in restorative justice processes. I will argue, in Chapter 5, however, that the present structures of restorative justice cannot accommodate mercy any better than classic retribution. Instead, we are in need of a paradigm shift. At the very least, it will be necessary to clarify the terms on which mercy will be possible. If compassion is being exercised, we must acknowledge it (see Chapter 6). It is not enough to say that retributive justice, in its truest sense of emphasising desert, cannot accommodate mercy and forgiveness. Either mercy is just, and part of what a defendant deserves; or it is an unusual addition. At this stage, it must be acknowledged that judges are human. As such, they must be allowed to judge with humanity.

If we assume that our wrongdoer, for the purpose of this discussion, is the perpetrator of a criminal act, the first task is to distinguish an act of mercy bestowed on that offender by a judge at his trial, from an act or expression of forgiveness bestowed on him by the victim. In the next section, we will discuss the identity of forgiveness as a virtue and philosophical concept, and try to locate its use in the criminal trial.

2.3 The conditionality of forgiveness

Mercy is a way for a judge in the public setting of a trial to reduce, or sometimes eradicate, the extent of the offender's deserved punishment. This may be compatible with desert, following Card and Smart. Forgiveness, on the other hand, does not require that the punishment is reduced – indeed, punishment can be fully imposed. Forgiveness is a gift from the victim, a change of heart, a refusal to bear a grudge.

Can forgiveness be located in the criminal trial? It is different from mercy, for the reasons given above. A judge cannot forgive, in theory, as he is not the one who has

been injured. He does not have the 'standing', or 'locus' to forgive⁹⁴.

In practical terms, forgiveness will emerge in the criminal trial on the rare occasions when a victim wishes to forgive. However that victim will feel constrained in doing so, or in expressing any emotion, because a criminal trial is not the place for it. I will argue that such a place ought to be found. There are countless definitions and understandings of forgiveness, in theology, law, psychology and literature. In this thesis, I will concentrate on the use of forgiveness in criminal law, and importantly, on what terms such forgiveness can take place, including whether it can have conditions attached to be effective. Is punishment irrelevant to forgiveness, or can these concepts have a relationship? In undertaking this discussion, I will explain my preferred version of forgiveness – a recognition that where forgiveness is desired, some mechanism ought to exist to allow its expression.

Before deciding on the nature of such forgiveness, it will be important to define it. Etymologically, the origin of the word is in *forgiefan*⁹⁵ meaning to give, to grant, or to allow. It also appears to mean to give up. Forgiveness has its most prolific representation in theology. I will not undertake an overview of what forgiveness means to different faiths in this thesis. The concept cannot be examined properly without some consideration of its connotations in Biblical language. There are many meanings and uses in both the Old and New Testaments, including a release from debt, a disregard of or putting aside sin, saving, justification, reconciliation and atonement. What is clear is that in the request for forgiveness, there is always a sense of subservience and a power dynamic. In the New Testament, forgiveness is a duty without limit, to be granted without reserve. To refuse to forgive is the very essence of the unpardonable sin. This idea continues today, with the meaning of a 'Christian spirit' being commonly understood to be synonymous with a forgiving disposition. The principle of forgiveness cannot be reduced to a particular formula, taking into account Jesus' declaration that forgiveness should take place not 'seventy times, but

⁹⁴ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.21.

⁹⁵ See Charles Griswold, *Forgiveness: A Philosophical Exploration* (Cambridge University Press 2007). Griswold's work provides an excellent, detailed overview of these interpretations.

seventy times seven'.⁹⁶ This all implies that forgiveness is to be given freely, if so, it would not have an impact on deserved punishment.

In the following section, I will consider the philosophical nature of forgiveness, and discuss its relationship to law.

Forgiveness can be understood as a personal, individual response to a wrongdoing or an injury, or a seeking of that response by the person doing the wrong. As we have seen above, the etymology of the word includes the concept of 'giving', it can therefore, be considered to be a dyadic relation, as a gift from one to the other. In theory this means that it can take place even if punishment also takes place. It also means, to return to its etymological definition, that it is a gift from which we do not expect a return. This leads us to the next section, which is to ask, if when a victim decides to bestow forgiveness, what form that forgiveness might take, and whether it has conditions attached. Does it take place in spite of or in addition to punishment?

Before embarking on some of the extensive literature regarding forgiveness, a methodological note. Forgiveness is subject to a huge body of literature in the fields of law, theology, psychology and literature. I have chosen works that seem to encapsulate the aspects of forgiveness, which are pertinent to a discussion of whether victim forgiveness should be possible, if desired, within the setting of the criminal trial. The first contradiction in the definition of forgiveness is whether forgiveness is given freely, or whether it has conditions attached.

Is forgiveness, then, a 'gift', bestowed on one individual by another? If forgiveness requires repentance before it is bestowed, then it loses its gift-like nature as it begins then to resemble an exchange relationship. If it is an act of grace, it can take place despite punishment. If it requires conditions, such as repentance or apology, it becomes more akin to the social contract in which one party forgives in exchange for the other's remorse. The Truth and Reconciliation Commission in South Africa did not require remorse for this very reason, although remorse was often heard in its narratives.

⁹⁶ Matt 18:21-22.

In *Cosmopolitanism and Forgiveness*, Jacques Derrida argues that in order to be effective, forgiveness cannot have norms imposed upon it but should remain exceptional in the face of the impossible⁹⁷. This is the ‘paradox’ of forgiveness – it would be too easy to forgive that which is *easily* forgivable, so true forgiveness can only be an exceptional act, without conditions. It is only possible to forgive the unforgivable, since forgiving a forgivable act would be too easy. Real forgiveness, freely given, would have to forgive the unforgivable, the truly atrocious act. Forgiveness, therefore, is impossible:

must one not maintain that an act of forgiveness worthy of its name, if ever, must forgive the unforgivable without condition? And that such unconditionality is also inscribed like its contrary namely the condition of repentance in ‘our’ heritage? Even if this radical purity can seem excessive, hyperbolic, mad? Because if I say, as I think, that forgiveness is mad, and that it must remain a madness of the impossible, this is certainly not to exclude or disqualify it.⁹⁸

This ‘impossibility’ of forgiveness, to which Derrida refers, is that for certain crimes true forgiveness cannot take place, as it would have no meaning (*sens*). The *sens*, or ‘meaning’ that would be required would have to be in the form of repentance, redemption or atonement. The moment that conditions are attached to forgiveness is the moment that one loses the capacity to be truly forgiving. Once this type of forgiveness is given, there would be no limits to it, as it would involve, in theory, forgiving the unrepentant eternally.⁹⁹ Therefore, forgiveness contains a fundamental contradiction (it is impossible to forgive that which is forgivable). Derrida’s vision of forgiveness here is partly inspired by his distrust of easy forgiveness. He wishes to say, however, that it should not, on that basis, be excluded:

unconditional forgiveness and a hyperbolic ethics are not impossible despite the catastrophic limit-events of the 20th century.¹⁰⁰

⁹⁷ Jacques Derrida, *On Cosmopolitanism and Forgiveness* Simon Critchley and Richard Kearney (eds) translation Dooley, M., and Hughes, M (first publ. 1997 as ‘*Cosmopolites de tous les pays, encore un effort*’), Thinking in Action Series, Routledge, Oxford. p.45.

⁹⁸ Jacques Derrida, *On Cosmopolitanism and Forgiveness* Simon Critchley and Richard Kearney (eds) translation Dooley, M., and Hughes, M (first publ. 1997 as ‘*Cosmopolites de tous les pays, encore un effort*’), Thinking in Action Series, Routledge, Oxford. p.39.

⁹⁹ Jacques Derrida, *On Cosmopolitanism and Forgiveness* Simon Critchley and Richard Kearney (eds) translation Dooley, M., and Hughes, M (first publ. 1997 as ‘*Cosmopolites de tous les pays, encore un effort*’), Thinking in Action Series, Routledge, Oxford. p.39.

¹⁰⁰ Jacques Derrida, *On Cosmopolitanism and Forgiveness* Simon Critchley and Richard Kearney (eds) translation Dooley, M., and Hughes, M (first publ. 1997 as ‘*Cosmopolites de tous les pays, encore un effort*’), Thinking in Action Series, Routledge, Oxford. p.41.

A further problem with forgiveness, for Derrida, is the problem of power. At the moment of forgiveness, the forgiver assumes some sort of sovereignty or power over the one he forgives. Part of this paradox relates to state or political forgiveness in the form of mercy. Forgiveness has no place in a political or legal situation: for example, state pardons, clemency, and national or governmental apology, which are often given too freely to the point that they have lost their meaning. In his article on Jacques Derrida's approach to justice and forgiveness, David Brenner explains Derrida's work on the limits of legality as an ethical institution. He holds that Derrida's approach is moderated by an awareness of the impossibility of ethics in the framework of positive law¹⁰¹. What Derrida means, in effect, is that impossibility involves taking a leap of faith by deciding to forgive. Derrida is torn between possibility and impossibility in this way: infinite responsibility for the other ought to guide political and legal action so that decisions are not purely political or legal (but include aspects of mercy for example); but at the same time it is important that such infinite responsibility does not dictate precise political or legal action, lest it lose its infinity. What is clear, however, is that such impossible forgiveness should exist outside sovereign power. This is important as the forgiving party is rarely bereft of all power. Derrida's hope is that

for the legitimacy of the law depends on the perlocutionary promise that one day 'to come' unconditional justice might actually be extended to those persons and acts previously excluded from its realisation.¹⁰²

The criminal justice system in its present incarnation cannot accommodate forgiveness. However, the suggestion is that with a leap of faith, this may be a possibility. This is an idea that will be developed further in this thesis. Forgiveness in a legal context, may be a possibility, if we look at law and politics in a different way, through a different lens. Derrida then goes on to say that it is important to distinguish between that type of forgiveness, which involves a third party (the State) and that which takes place between offender and victim. He asks whether it is necessary to

¹⁰¹ David A. Brenner (2005), 'Torn' Between Justice and Forgiveness: Derrida on the Death Penalty and 'Lawful Lawlessness', in Austin Sarat (ed.) *Crime and Punishment: Perspectives from the Humanities* (Studies in Law, Politics, and Society, Volume 37), Emerald Group Oxford University Press Publishing Limited, p.109-122.

¹⁰² Jacques Derrida, *On Cosmopolitanism and Forgiveness* Simon Critchley and Richard Kearney (eds) translation Dooley, M., and Hughes, M (first publ. 1997 as '*Cosmopolites de tous les pays, encore un effort*'), Thinking in Action Series, Routledge, Oxford. p.40.

have some sort of state intervention. If so, according to Derrida, this is not 'pure' forgiveness. This would be amnesty or perhaps reparation. No politics or law can be founded on forgiveness – the word has been used and abused, it has become a leitmotiv, which has to be calculating, especially in the political sphere.

there is always a strategically or political calculation in the generous gesture of one who offers reconciliation or amnesty, and it is necessary always to integrate this calculation in our analyses.¹⁰³

This might be present in the exercise of sovereign power, when mercy is bestowed by a judge, but also ultimately, when a victim of crime chooses privately to forgive. The choice to forgive rests with the victim who will in this situation always have power over the offender. This could be said to be an exchange relationship, in the sense that if the victim has lost power when the crime was committed, he gains it back when he is considering whether to forgive the offender who has harmed him. In order to forgive, we may demand contrition, or some other condition. Derrida questions the idea that forgiveness can only be obtained in response to something, in exchange for something, and prefers the idea of it being a donation or gift, outside the concept of investment and return. There is a difference between pure, unconditional forgiveness and forgiveness given in exchange for contrition. No exchange is needed here. There is also an impure forgiveness, where repentance is required first and may be asked for.

The practical effect of this is that offenders should not ask for forgiveness and victims should not expect it. True forgiveness only exists for the unforgivable, the irreparable. Pardoning in order to heal or to restore, is not forgiveness, it is a calculation. The paradox of forgiveness for Derrida, as outlined here, is that true forgiveness is impossible to achieve, although we may take the risk of doing so. He objects to the idea of forgiveness having conditions attached, as it is then too similar to an exchange relation, a tit-for-tat.

So in order to have any practical effect, there must be conditions. At the same time, the only true forgiveness can have is an unconditional forgiveness and remains the madness of the impossible. Derrida found himself torn between a hyperbolic,

¹⁰³ Jacques Derrida, *On Cosmopolitanism and Forgiveness* Simon Critchley and Richard Kearney (eds) translation Dooley, M., and Hughes, M (first publ. 1997 as '*Cosmopolites de tous les pays, encore un effort*'), Thinking in Action Series, Routledge, Oxford. p.55.

impossible, ethical vision of forgiveness, pure forgiveness, and the reality of a society at work in pragmatic processes of reconciliation. The reality of the court and the forgiveness in the heart do not always coincide. This is Derrida's debate over the distinction between the imprescriptible and something which is unforgivable:

must we not accept that in heart or in reason above all when it is a question of forgiveness something arrives which exceeds all institution, all power, all juridical-political authority? We can imagine that someone a victim of the worst, himself, a member of his family, in his generation or the preceding, demands that justice be done, that the criminals appear before a court, be judged and condemned by a court and yet in his heart forgives. The reverse is also true. We can imagine and accept that someone would never forgive even after a process of acquittal or amnesty. The secret of this experience remains.¹⁰⁴

The ideal democracy to come is to be found in the enigma of the unforgivable, the madness which the juridico-political cannot approach:¹⁰⁵

because that means it remains heterogenous to the order of politics or of the juridical as they are ordinarily understood.....If our idea of forgiveness falls into ruin as soon as it is deprived of its pole of absolute reference, namely its unconditional purity, it remains nonetheless inseparable from what is heterogenous to it, namely the order of conditions, repentance, transformation, as many things as allow it to inscribe itself in history, in law, politics and existence itself. The two poles, the unconditional and the conditional are absolutely heterogeneous and must remain irreducible to one another. They are nonetheless indissociable; if one wants, and it is necessary, forgiveness to become effective, concrete, historic, if one wants it to arrive, to happen by changing things, it is necessary that this purity engage itself in a series of conditions of all kinds. It is between these two poles, irreconcilable yet indissociable, that decisions and responsibilities are to be taken.¹⁰⁶

In sum, forgiveness presupposes some sovereign power. Derrida envisages an unconditional, unsovereign form of forgiveness. There is a fundamental tension in forgiveness between the conditional and the unconditional. The ideal form of forgiveness would be an unconditional pure form similar to Levinas' ethics, based on infinite responsibility. This is the justice 'to come' where forgiveness can take place in spite of being unforgivable.

¹⁰⁴ Jacques Derrida, *On Cosmopolitanism and Forgiveness* Simon Critchley and Richard Kearney (eds) translation Dooley, M., and Hughes, M (first publ. 1997 as '*Cosmopolites de tous les pays, encore un effort*'), Thinking in Action Series, Routledge, Oxford. p.44-45.

¹⁰⁵ Jacques Derrida, *On Cosmopolitanism and Forgiveness* Simon Critchley and Richard Kearney (eds) translation Dooley, M., and Hughes, M (first publ. 1997 as '*Cosmopolites de tous les pays, encore un effort*'), Thinking in Action Series, Routledge, Oxford. p.44-45.

¹⁰⁶ Jacques Derrida, *On Cosmopolitanism and Forgiveness* Simon Critchley and Richard Kearney (eds) translation Dooley, M., and Hughes, M (first publ. 1997 as '*Cosmopolites de tous les pays, encore un effort*'), Thinking in Action Series, Routledge, Oxford. p.44-45.

To summarise, one way of looking at forgiveness is to say that it is a gift, freely given, in its true sense. Derrida's analysis shows that this is difficult to achieve, since we are always influenced by the power dynamic, which takes place as soon as we express forgiveness. Forgiveness, for Derrida, then, is caught between the possible and the impossible. This is the impossibility of forgiveness. Furthermore, forgiveness cannot take place in the world of politics or in the law. What Derrida has in mind here, I presume, are expressions of pardon, glibly given, by Heads of State, to apologise for past wrongs on a national level. Finally, it is important that forgiveness does not become an exchange relation, a tit-for-tat. If it does, it is not forgiveness. One of the problems in the reconciliation model of restorative justice is that it is difficult to escape the power dynamic between victim and offender. This will be explored in Chapter 5.

The Kantian system of morality, translated into criminal law, suggests the following. An offender commits a crime in the full knowledge that if caught he will be punished. In *exchange* for the act committed, he is punished. Forgiveness works against this idea if we perceive forgiveness as a gift with no expectation of return. Such a notion of forgiveness challenges the notion of a conditional forgiveness that usually takes place within a socio-legal context. In this regard, we need to consider whether we truly forgive, when, for example, we require repentance or an apology. Does punishment preclude forgiveness? If forgiveness is a pure gift, then we do not normally attach conditions.

It may be that forgiveness could retain its gift-like status in the criminal trial, as it does not always depend on punishment. It may take place, on a personal level, with or without punishment. The victim could still *express* forgiveness in the criminal trial. It is appreciated that not all forgiving victims will want to do this, and that, for some, repentance or apology will be required first. In Chapter 5, I will consider some restorative justice processes in which the victim seeks the offender's apology. In some cases, an acceptance of apology is conflated with forgiveness. I will argue that this is one reason that restorative justice does not 'frame' mercy and forgiveness in a satisfactory way. If the type of forgiveness needed still requires 'something in return',

then it is closer to the Kantian ideal than what was previously thought. If on the other hand, it acts as a matter of grace¹⁰⁷, independent even of the fact that punishment has taken place, or will take place, then we are closer to the idea of forgiveness bestowed because we are connected to others.

Charles Griswold, in his seminal work on the philosophy of forgiveness, argues that in order to be effective, conditions *must* be attached. Griswold emphasises that forgiveness is a dialogue and set of 'steps' which are necessary before forgiveness can take place. He argues that a person wronged should forgive when the offender has taken responsibility for the wrong, the wrongdoer repudiates his wrong, there is an expression of regret on the part of the wrongdoer, the wrongdoer commits to change, the wrongdoer expresses sympathy for the victim and finally the wrongdoer offers a narrative account of herself and her wrong that puts it into a personal context.¹⁰⁸ Griswold suggests that in the dyadic relationship that is forgiveness, in order to achieve that letting go of resentment, these conditions are necessary. Otherwise, 'to forgive would collapse into condonation'.¹⁰⁹

In Griswold's version of forgiveness, therefore, a dialogue must take place. It is, he says a *dyadic* process, in which, forgiveness is communicated and the wrongdoer has an opportunity to 'tell his story' in the narrative account of his wrong. This sounds like restorative justice, but in fact has echoes of the social contract, the politics of exchange and Kantian retributive criminal justice.

Some useful themes emerge from Griswold's definitions. First, his assertion that forgiveness requires that the offender admits responsibility has implications for us, as it shows that forgiveness does not have to exclude punishment. This taking of responsibility would seem to be an acknowledgement of the wrong and a repudiation of it. It is only in these circumstances that a victim may be validly inclined to forgive, to overcome the legitimate resentment he or she feels.

¹⁰⁷ Herbert Morris 'Murphy on Forgiveness' *Criminal Justice Ethics* 7 (2):15-19.

¹⁰⁸ Charles Griswold, *Forgiveness: A Philosophical Exploration* (Cambridge University Press 2007). p.59-71.

¹⁰⁹ Charles Griswold, *Forgiveness: A Philosophical Exploration* (Cambridge University Press 2007) p.49.

Secondly, forgiveness is a process with clear steps. So far, we have seen that forgiveness is a private decision, sometimes with certain conditions attached. It can only be given, for Griswold, once the story of the offender has been told and the harm caused to the offender is acknowledged. Beyond this, the offender must commit to change.

these are conditions of a moral nature that may warrant a change of belief about the bad person's character and therefore warrant that the injured party should amend her view that the wrongdoer is reducible to the agent who did those wrongs¹¹⁰

In other words, the conditions that Griswold imposes are necessary to ensure that by forgiving wrongdoing, we are not simply allowing the moral injury to continue. The second requirement is one of repudiation of the deed (a commitment not to repeat them); the third is a requirement of regret in a very particular sense. This aims at showing respect to the victim. We will see that one of the reasons that forgiveness is not easily accepted in the criminal justice system is due to the fact that each person in society is perceived a reasonable individual with free will. This is a Kantian ideal of subjecthood. By condoning a crime through forgiveness, we are denying the victim the respect he or she deserves, as a legitimate member of society. The offender cannot be allowed to gain an unfair advantage.

Griswold's definition of forgiveness involves a process, where both parties must go through, in order to render forgiveness effective. The parents of Trayvon Martin, killed in 'self-defence' by George Zimmerman in a gated community in Florida, expressed the wish for, but the difficulty of forgiveness.¹¹¹ We can say that the model of forgiveness used by restorative justice practices is similar to Griswold's. I will argue that the type of forgiveness exercised must be a choice for the victim, and may take place with or without repentance or apology. Meyer argues that repentance will not mean true mercy.

¹¹⁰ Charles Griswold, *Forgiveness: A Philosophical Exploration* (Cambridge University Press 2007) p.54.

¹¹¹ 'As Christians we have to forgive,' says Ms Fulton. 'But it's a process, and we are still going through that healing process. We are still in the process of forgiveness. We know it's coming but we're just not there yet.' <http://www.bbc.co.uk/news/world-us-canada-23822998> 24 August 2013, accessed 7 August 2014.

Whilst I acknowledge that forgiveness moving from a victim to an offender is indeed a process, I understand this term somewhat differently. Griswold's model requires one stage of the process to be completed (the repentance or apology) before forgiveness can be considered. The narratives provided by the Forgiveness Project show that in fact the reality is very different. The requirement of repentance is in fact much rarer, and the choice to forgive is more often than not a personal decision irrespective of the offender's choices. Furthermore, forgiveness is rarely linear.

2.4 Forgiveness, memory and resentment

The classic definition of forgiveness is Bishop Butler's in his Fifteen Sermons: that of *overcoming resentment*, described in the following way:

the resolute overcoming, on moral grounds, of the intense negative reactive attitudes that are naturally occasioned when one has been wronged by another, mainly the vindictive passions of resentment, anger, hatred and the desire for revenge.¹¹²

In order to examine this further, it is necessary to understand exactly what is meant by resentment as an emotion. It makes moral injury a requirement, and that the behaviour requires a moral agent to be aware of what he does. The system of criminal law currently in place is one, which can be said to institutionalise resentment. As we will see, early interpretations of the role of the criminal law indicate that it gives expression to the 'natural' feelings of vengeance which we feel when wrong is done to us. A 'tempered' version of this is apparent in current penal policy. We do not encourage revenge, but punishment is seen as a just, deserved response to criminal behaviour. If this is what is meant by resentment, then 'letting go' or relinquishing that resentment would mean letting go of the idea of punishment. I will argue that incorporating forgiveness into the criminal justice process, whether in the substantive law or in the area of sentencing guidelines does not necessarily involve giving up the idea of punishment. Resentment, of course, is close to bearing a grudge, the very opposite of forgiveness, and is an emotional response. In Chapter 3, I will develop this idea, and explain how Kantian criminal law became the state embodiment of resentment.

¹¹² Joseph Butler, Fifteen Sermons, Sermon 8, '*Upon Resentment*' and Sermon 9 '*Upon Forgiveness of Injuries*' cited in Jeffrie G. Murphy and Jean Hampton '*Forgiveness and Mercy*', (Cambridge University Press 1988) p.15.

Garcia disagrees with this definition on the grounds that it presupposes that resentment is incompatible with the good will, and secondly, that we can only forgive once we have stopped resenting. Instead he questions whether forgiving means giving up all of our resentment. In other words, we can retain resentment even when we are forgiving. This resentment must simply not be felt to excess. It partly explains why forgiveness is so difficult to achieve. It maintains the 'enemy' element of 'forgive your enemy':

forgiveness never demands that we foreswear or renounce resentment but only that we display virtuous resentment by avoiding both deficient and excessive resentment against our wrongdoers¹¹³

This, Garcia argues, is the true interpretation of the Butlerian view of forgiveness. In forgiveness, we are making a moral assessment of the wrongdoer from the perspective of the victim, in order to allow the relinquishing of resentment. This does not mean an actual return to a previous state but a 'reorienting' of the previous relationship in order to move beyond negative emotions. For the wrongdoer, there is a release from blame, a moving forward, a transfiguration of the past. According to Murphy, a staunch advocate of Kantian criminal law values, this is what distinguishes forgiveness from other types of relinquishing emotions. He says that the overcoming of resentment linked to a moral harm done, helps to distinguish forgiveness from other modes of overcoming resentment, such as forgetting a wrong in order to maintain a relationship, or when a victim seeks therapy to stop feeling angry. If these possibilities do not lead to forgiveness, then forgiveness must be redefined as overcoming resentment on moral grounds. It might also involve overcoming other retributive emotions such as hatred, indignation and contempt.

Tutu deals with the problem of forgiving and forgetting:

in forgiving, people are not being asked to forget. On the contrary, it is important to remember....it means taking what has happened seriously and not minimizing it; drawing out the sting in the memory that threatens to poison our entire existence. It involves trying to understand the perpetrators and so have empathy, try to stand in their shoes, and to appreciate the sorts of pressures or influences that might have brought them to do what they did.¹¹⁴

¹¹³ Ernesto Garcia 'Bishop Butler on Forgiveness and Resentment' (*Philosopher's Imprint*, vol.11, no 10, 2011) p.4.

¹¹⁴ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) p. 219.

Jean Hampton in distinguishing condonation and forgiveness makes the point that forgiving does not necessarily extinguish the wrong – a point made abundantly clear by the Truth and Reconciliation Commission in South Africa:

forgiving someone presupposes that the action to be forgiven was wrong, and nothing in the act of forgiveness communicates to the wrongdoer that the action was permissible after all or that the forgiver has decided to reject as inappropriate any previous resentment of it.¹¹⁵

The Biblical understanding of forgiveness, along with Griswold's and Murphy's above, usually requires some evidence of repentance or apology. We will see that this is reflected in modern restorative justice practices and in the process of forgiveness. This theme will be discussed later. One of the problems which we will identify in the Kantian model of criminal law and punishment is that justice is characterised by Norrie and others as an exchange relation (the promise to behave as a good citizen in exchange for the promise that those who gain an unfair advantage by committing crime will be punished, and the rest of society protected). In presenting a different paradigm, which does not take reason and the social contract as the only basis for morality, we can also begin to question a model of mercy and forgiveness, which asks for repentance before it is prepared to bestow forgiveness. On the contrary, some commentators see forgiveness as a 'gift', bestowed freely, an 'act of grace'¹¹⁶.

Proponents of the restorative justice movement emphasise that forgiveness may lead to reconciliation or a meeting between the offender and the victim. However, it is clear that this does not exclude punishment. Nor does it preclude forgiveness. Forgiveness, in this context, is a unilateral gesture: reconciliation is a mutual decision. This will be discussed later, in Chapter 7.

Tutu comments:

forgiveness and being reconciled are not about pretending that things are other than they are. It is not patting one another on the back and turning a blind eye to the wrong. True reconciliation exposes the awfulness, the abuse, the pain, the degradation, the truth. It could even sometimes make things worse. It is a risky

¹¹⁵ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.40.

¹¹⁶ Herbert Morris 'Murphy on Forgiveness' *Criminal Justice Ethics* 7 (2): 15-19.

undertaking, but in the end it is worthwhile, because in the end there will be real healing from having dealt with the real situation. Spurious reconciliation can bring only spurious healing.¹¹⁷

One of the philosophical concerns regarding forgiveness is that the person forgiving still exerts power over the one to be forgiven. This also will be discussed later, in the context of Linda Ross Meyer's new theory of a justice of mercy¹¹⁸. I will show that these power dynamics need not, in fact, be compromised by a forgiving victim.

By contrast, forgiveness can be said to empower the victim whilst relinquishing the aspect of revenge, involving as it does 'abandoning your right to pay back the offender in his own coin, but it is a loss which liberates the victim'¹¹⁹.

Forgiveness, then, is a personal decision to overcome the resentment one feels when harm is done. However, it must be exercised with extreme caution, however. According to Jeffrie Murphy, if forgiveness is given too freely, it is an indicator of a lack of self-respect¹²⁰ and dignity on the part of the victim. In hasty forgiveness, there lies the risk of a loss of self-respect, an important self-defence mechanism and an affirmation of a reasoned individuality. This partly answers the question posed above in relation to condonation. Murphy is clear that, even if a victim chooses to extend forgiveness privately, it must be done with conditions of repentance. Otherwise, it runs the risk of appearing too similar to condonation, and therefore analogous to the loss of self-respect he is afraid of.

¹¹⁷ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) p.219.

¹¹⁸ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.3.

¹¹⁹ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) p.219.

¹²⁰ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988).

2.5 Locating mercy in the political and the ethical

In this chapter, I have built on the two main areas in which forgiving is relevant to criminal justice – that of the merciful judge, and that of privately motivated victim of forgiveness.

The use of mercy is full of contradictions, both philosophically and practically. We saw in Chapter 1 that mercy is excluded from a traditional theoretical concept of criminal law and punishment because it is unfair, as it does not treat like cases alike. This theory treats the criminal subject as a reasoned autonomous individual, and does not allow personal characteristics or circumstances to be taken into account as part of the sentencing process. I indicated then that I would challenge this view. I will argue that merciful sentencing does take place, in criminal defences. Judges also take account of the victim's views. The feelings of the victim are not excluded, as victim personal statements are now required, and the requirement that a judge does not allow these to influence sentencing is ambitious to say the least.

I will argue that forgiveness and mercy could be considered as one of the many mitigating factors in the criminal trial. This is supported by an assertion that some victims do want to forgive, but feel constrained by the criminal trial.

I have explored how mercy, and its closely related concepts of pardon and clemency, are political acts performed in the public domain. Forgiveness is a private act moving from a victim, who experiences a change of heart towards the person who has offended him.

In order to be able to comment on whether it could be used in law, it is important to understand what it means theoretically. The literature falls into two areas – on the one hand, we can understand forgiveness as a gift, with no expectation of return. On the other, we can say that for some, forgiveness is only possible if certain conditions are satisfied. Derrida further explains this paradox but who believes that forgiveness cannot find a place in a political or legal sphere. If forgiveness requires that the offender repents or apologises, perhaps it is not forgiveness. For Griswold, the process of forgiveness is only possible within these conditions. We considered various interpretations and definitions of forgiveness in this regard. If it is a letting go

of resentment as Murphy suggests, then this leaves room for punishment as well. 'Free' forgiveness indicates a lack or a loss of self-respect on the part of the victim, according to Murphy. Butler's definition of forgiveness as a letting go of resentment is important as resentment is similar to retribution. This is important as we are trying to find the place of forgiveness in the criminal justice system which is retributive, not restorative.

We will see how, building on Linda Ross Meyer's critique of Kant, that this is only true if reason is accepted as the basis for the criminal law. The public world of law is abstract and universal, but forgiveness and mercy are about the particular, the offender's personal circumstances. As we will see in Chapter 4, Alan Norrie argues that these must be taken account of if we are to achieve fair, democratic justice. The private world of emotion, of forgiveness, on the other hand, is an ethical place. We will see in Chapter 4, how, in the thought of Levinas, through Meyer, a place might be found for mercy and forgiveness in the political as well as in the ethical. These two worlds can be seen to collide.

In the next section I will discuss the interpretations of forgiveness which I have examined in this chapter and attempt to explain which interpretation works best for the argument contained in this thesis. That argument is that the process of forgiveness is not to be defined in absolute terms, but may mean different things to different people.

Various questions arise in a discussion of forgiveness in the context of the criminal justice system. The first is to ask whether forgiveness can ever be morally or ethically required. If so, can one who chooses to express it or extend it, attach conditions? Secondly, if forgiveness can be located in the criminal justice system, where can we find it? Does it have a place in the legal (and its corollary, political) system? Or does it lie firmly in the realm of the ethical?

The first consideration was of the nature of forgiveness. Whilst Griswold acknowledges forgiveness as a two way process, he requires remorse as a necessary condition for the victim to be able to express feelings. He states that this process has certain defined stages. I prefer the idea of an unfolding or a movement towards something that one is trying to achieve. This is the approach taken by the Forgiveness

Project and is that portrayed in the play, *The Long Road*. Mary's statement in the play that at times she feels she can forgive, and at others that forgiveness is impossible, is evidence of this 'unfolding'.

Forgiveness here is something, which, once considered, does not go away. The process is not a linear, step-by-step process, but one which is always evolving. It can be different things to different people. It is not an answer or a destination. Forgiveness is in fact a process but I disagree with Griswold's contention that there must be certain stages, even with Butler's letting go of resentment.

The Forgiveness Project advocates forgiveness as a process in this way and emphasises the difficulty and problems inherent in 'easy' forgiveness. This is also the type of forgiveness embodied in the *'Long Road'*. For this type of forgiveness, even the performative action of language a starting to forgive, may be able to accommodate it. The problem arises when it is too prescriptive. Thus, it can certainly be said that forgiveness cannot be required of a victim.

Murphy's adoption of Bishop Butler's definition of forgiveness as being a 'letting go of resentment' results in a concept of forgiveness which is to be admired, but which must remain in the scope of the private sphere. It cannot be part of law, part of politics, because it is too emotional and is therefore at risk of partiality. Murphy does acknowledge that forgiveness can be an act of grace but sees no place for it in the criminal process. As the criminal courts deal with emotions, it seems fallacious to suggest that it can be exempt from forgiveness from time to time. Criminal law engages, after all, with the emotions. An understanding of forgiveness which recognises the process of forgiveness would allow the victim to remain angry, to remain resentful. This is the interpretation provided by Garcia. Forgiveness need not preclude punishment, or the administration of justice.

The other camp espoused by Meyer and Morris advocates forgiveness as an act of grace. It is, Meyer says, a 'gift to the guilty'. On a philosophical basis, the gift of forgiveness is a way of erasing time. Crucial to this discussion is the question of whether forgiveness requires conditions. The understanding of forgiveness which I would like to suggest is neither one which is conditional, nor one which does not require conditions. Having conditions, such as remorse or the requirement of an

apology, attached would kill the spirit of forgiveness. Mercy must be freely given.

A distinction is to be made between forgiveness as a moral condition, and the moral conditions of forgiveness. No type of forgiveness can be morally required. In this way, I agree with Linda Meyer, that forgiveness will lose out once conditions are attached and it fails to be true. Nonetheless, for some victims, it will be useful and even a part of that particular type of forgiveness, to request remorse, to request an apology. It is important that it works both ways, however. The classic objection to forgiveness in the criminal trial is that it would be wrong to require a victim of violent crime to forgive. At the same time, it would be wrong to require remorse if it is not forthcoming. The undesirability for example of requiring a victim of domestic violence to ‘forgive’ her attacker cannot be overstated. On the other hand, where a victim chooses to forgive, she should not be prevented from expressing it in a court.

The imposition of conditions seems to be resonant of the social contract. Forgiveness with conditions can only be given once something else has been given in return. The recognition of forgiveness as unique to each case, a process for each victim and defendant to work out for themselves would not be dependent on universal conditions. Instead, a recognition that in telling a story, in allowing the victim to provide a narrative, may be preferable. This is a graceful act more akin to Meyer’s philosophy of mercy. It would however also include the possibility of the defendant making a statement. I agree with her suggestion of removing the possibility of a lower sentence in exchange for remorse.

In restorative justice we can see some recognition of the expression of forgiveness, but the system gives it no support – although it can be recognised as an outcome.

In answer to the second question on the location of forgiveness, we saw that Meyer places forgiveness in the ethical, in Levinasian interpretation of recognising the trauma that the offender feels. For Levinas, forgiveness is possible as an ethical idea as it treats the offence as having never happened. It is as if the instant had not elapsed. This is possible as it is done as a gift for the person who is in need of forgiveness. Derrida seems to think true forgiveness cannot have conditions attached but that it must have conditions attached to belong in the political. Norrie makes a similar argument, although not in the context of forgiveness. I will argue that law’s failure to

account for forgiveness does not simply stem from a failure to account for the political, but also the ethical. Law, of course, is in the realm of the political, but in the treatment of victims in the criminal trial, we see that law is becoming concerned with the private world of ethics and emotion.

Traditionally, the state excludes forgiveness, but this need not be the case if forgiveness is treated alongside other factors to be considered in the criminal trial. Victims could express it if they wish to and judges could exercise it as part of their overall discretion. Sentencing hearings could be altered to include defendants' statements as well as those coming from victims. In this way, forgiveness can be seen as a hybrid, between emotion and reason and between ethics and politics. Meyer refers to the risk of forgiveness. It would certainly suggest a change in attitude.

In summary, the idea of forgiveness used in this thesis is not one bound by the condition of remorse or anything else. It is a gift freely given. At the same time, it is a process, which a victim of crime may choose to undertake. This process is often challenging, and is not, as we see in the play, *The Long Road*, a linear one. In other words, the decision to forgive does not always result in forgiveness itself and can contain elements of anger and changes of heart. However, in situations in which a victim wishes to express it, the criminal justice system must make this into a possibility. Secondly, in terms of locating that possibility in criminal justice, I will argue that law's insistence that forgiveness belongs only in the ethical domain is no longer tenable.

In the next chapter, in order to advance the argument that criminal law should accommodate the spirit of forgiveness, I will explain and analyse the reasons for its exclusion. In other words, it traces the development of criminal law and punishment in the UK as a Kantian-influenced system – one in which reason is everything. As such, mercy and forgiveness have no place.

3. MERCY AND THE RETRIBUTIVE IDEAL

Reason to rule but mercy to forgive: the first is law, the last prerogative.¹²¹

Forgiveness, which is a virtue¹²² borne of the private emotions, cannot be part of the legal system, as it would not be fair, consistent, or proportionate. It should therefore be relegated to the arena of private feelings and emotions, rather than have any role in State-imposed punishment. The idea of a forgiving victim, or a merciful judgment, cannot officially be part of this process. Merciful judgments are rare. The lines between excuses, mercy, forgiveness and pardon are blurred, apart from the rare exercise of the Royal Prerogative of Mercy. 'State' pardons are virtually unknown. In English law, the concept of equity had allowed for a departure from strict legal judgments in contract and land law, but this was a relatively unknown concept in criminal law.¹²³ Slaughter's description of mercy explained the reason for this: namely the move from reconciliation to retribution, according to Enlightenment ideals.

In this chapter, I will start to explain the theoretical basis for the exclusion of mercy in criminal justice process and trace how Enlightenment moral philosophy created the groundwork for a legal system in which reason was everything¹²⁴. By examining retributivism and desert, both in its more extreme form and in the form of more modern retributivism in the philosophy of 'just deserts' it is possible to understand why it is not sympathetic to calls for mercy and forgiveness. In doing this, I will elaborate on the public world of mercy and the private, ethical world of forgiveness. These worlds cannot, for Derrida, be seen to collide. In fact, combining them may be the answer.

The model of criminal law and punishment practised by most Western societies can

¹²¹ John Dryden, *Poetical Works* (Stanhope Press 1808) p.119.

¹²² Immanuel Kant, *Groundwork of the Metaphysic of Morals* (Translated and analysed by H.J. Paton, Routledge 1991).

¹²³ See generally Mark Fortier, *The Culture of Equity in Early Modern England* (Ashgate 2005), arguing that it was equity, through the individual conscience of a judge, which made justice possible.

¹²⁴ See generally Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press 2000) and Claire Valier, *Theories of Crime and Punishment* (Longman Criminology Series 2002).

be attributed to Enlightenment thinking and in particular to an interpretation of Kant's moral philosophy. In this context, I explain how Kant disagreed with a utilitarian view of punishment. This is important for the study of forgiveness in criminal law as, in utilitarianism, the possibility of rehabilitation is accepted. By contrast, in the retributive idea, or in a philosophy of desert, the offender has received all he deserves including an entirely just punishment. Because a utilitarian philosophy of punishment operates on the notion of the greatest happiness for the greatest number, that calculation might allow for mercy if it can be of benefit to someone. However, in retributivism, desert theory, mercy cannot be allowed, as an offender in being punished *already* receives everything he deserves as that decision to punish is a just one, arrived at through the application of reason. This understanding, along with the importance of the social contract, translates into substantive criminal law (the notion of *mens rea* depends on our acceptance of the subject who commits crime as the morally blameworthy individual). The subject who accepts full responsibility for what he does has no excuses, can certainly not be forgiven or shown mercy, as this would compromise his right to make an autonomous choice, and would fail to respect him.

In discussing the Kantian approach, I draw on Jeffrie Murphy's contention that self-respect and respect for the wrongdoer are paramount.¹²⁵ Ian Edwards also holds that forgiveness threatens principles held dear in the modern legal system, such as consistency and proportionality, and has argued against allowing victims to have a say in legal decision-making¹²⁶. At the same time, there have been continued and renewed calls for the involvement of victims in the criminal process.

Not all retributivists disagree with the idea of mercy in the context of retribution. Where this is allowed, however, it is limited to pardon or clemency or in the wider context in the form of mitigation or excuses. The ways in which mercy may be hidden from view, the ways in which law may be refusing to acknowledge that it forgives, are explored in Chapter 6.

If mercy is compatible with retributivism, it is only in very limited circumstances.

¹²⁵ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988).

¹²⁶ Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of 'Their' Offenders' [2002] Crim LR p.689.

Kathleen Dean Moore¹²⁷ holds that State pardons, cannot only be justified in a retributivist system of punishment, but are allowed where it would be unfair to the defendant to do otherwise. As we saw in Chapter 2, Claudia Card holds that pardons and merciful judgments can in fact form part of the retributive idea without compromising those principles. The problem is not in the compatibility of mercy with retribution, but in the need for better articulation of mercy, and for a philosophy of compassion.

None of these commentators allow for forgiveness per se, holding it to be an entirely private matter. Dean Moore holds that due to this separateness, it is not in fact inconsistent with retribution and desert at all. It can be seen that whilst pardons in certain forms, and mercy, too, may be exercised by a judge in certain circumstances, no allowance is made for the victim who wishes to forgive. I will show that despite some forms of mercy and pardon being compatible with the retributive idea of punishment, forgiveness is not accounted for. One aspect of punishment inherent in retribution is the idea that in punishing, we are making a statement, not just about the harm the defendant has caused, but also about the type of person he is. Those who value forgiveness would argue that this is the wrong approach. This critique of retributivism will be explored further in Chapter 4. Furthermore, as we shall see, Jeffrie Murphy argues that a forgiving feeling, or emotion should not be part of law. He dismisses forgiveness as sentimentality and irrationality. On the other hand, the emotion of vindictiveness is valuable, as it is a sign that we value our self-respect¹²⁸.

What is needed is some clarity achievable through a new view of justice. In this chapter, I will explain in further detail some of the Kantian views of justice, forgiveness and mercy and place these in the context of an argument that reason cannot be the sole basis for an appraisal of the criminal subject, that the emotions cannot be discounted in the administration of justice, and that forgiveness and mercy cannot be excluded from the criminal justice system on the basis of a limited understanding of Kantian morality.

¹²⁷ Kathleen Dean Moore, *Pardons, Justice, Mercy and The Public Interest* (Oxford University Press 1989).

¹²⁸ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.16-19.

3.1 Desert and the institutionalization of resentment

The term *retribution* implies revenge and retaliation, usually of an extreme or violent kind. The language of retribution is well known in agendas for criminal justice policy and in media attention, when policymakers try to be seen to be tougher on crime. It is often equated with principles of justice in the form of 'tit for tat'.¹²⁹

Retribution as revenge is part of political and legal discourse. A survey of news items in August 2014 has shown that this notion of retribution appears to be present in issues such as honour killings and parents killing their children to avenge an estranged spouse. Politically, we can observe it in the escalating Israeli – Palestinian conflict, in Boko Haram's activities in Nigeria and with Isis in Syria. I opened this thesis by examining political descriptions of vengeful sentiments in the 'just' killing of Osama bin Laden by U.S. troops and the idea of 'bringing offenders to justice' in the London Riots of 2011.

This sort of punishment is based on the idea of an 'eye for an eye' – that the punishment should fit the crime. We can refer to the original source - Leviticus:

and he that killeth a man shall surely be put to death. And he that killeth a beast shall make it good; beast for beast. And if a man cause a blemish in his neighbour, as he has done, so shall it be done to him, breach for breach, eye for eye, tooth for tooth, as he has caused a blemish in a man, so it shall be done to him again.¹³⁰

Quoting Stephen, Murphy believes that the criminal law provides a structured framework for victims to obtain legitimate revenge when they have been wronged. In some circumstances, resentment is entirely appropriate:

the infliction of punishment by law gives definite expression and solemn ratification and justification to the hatred which is excited by the commission of the offence.¹³¹

We can understand criminal punishment, and even the criminal trial in this way:

¹²⁹ Kathleen Dean Moore, *Pardons, Justice, Mercy and The Public Interest* (Oxford University Press 1989) p.92. Dean Moore explains the origin of this term stating that it is not always completely understood by those who would advocate it: 'people who would not even try to pronounce 'retributivism' are comfortable giving voice to retributivist slogans'. 'Tit for tat', people say, without wondering what the words mean. The ancient meaning for 'tit' is a light stroke or blow. So people who are giving tit for tat are hitting each other in an even and unexciting fight.

¹³⁰ Leviticus 10:24.

¹³¹ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.3.

accountability for wrongdoing, public fact-finding in a setting marked by fairness and restraint, and certain and unbending punishment exacted by the state after full process, translate the desires for vengeance and redress into lawful, official action.¹³²

Early analysts of English law linked the idea of vengeance and resentment, holding a grudge, to legitimate and endorse punishment¹³³. This interpretation is very important for our understanding of why the criminal law in particular will not allow forgiveness – the law has ‘institutionalised’ that resentment and made it legitimate. If forgiveness is the Butlerian ‘letting go of resentment’¹³⁴, then the attitude of the common law to forgiveness and mercy is not difficult to understand. Valier points out that these passions were motivated by our understanding of morality. Quoting Durkheim, she notes that punishment was to be understood in terms of the emotions, which, according to Durkheim, is an

intense collective phenomenon...expressing the furious moral outrage of the group against those who had violated its sacred moral order.¹³⁵

If early interpretations of the *lex talionis*¹³⁶ meant that the offender was to receive punishment at least equal to the harm he had committed (literally, at times), more modern interpretations of the theory of retribution have concentrated on notions of proportionality, according to von Hirsch’s theory of ‘just desert’.¹³⁷ However, modern interpretations of retributive punishment are not based on vengeance of this sort, but rather on a measured, ‘civilised’ response to punishment.

in the present age, most of us do not feel comfortable talking about the criminal law in such terms, for we are inclined to think that civilised people are not given to hatred and to an anger so intense that it generates the desire for revenge.¹³⁸

¹³² Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice, This speech was delivered at the Anna E. Hirsch Lecture Series, held at the New England School of Law on January 30, 1998. <<http://www.nesl.edu/userfiles/file/lawreview/vol32/4/minow.htm#N>> accessed June 10, 2014.

¹³³ See generally Sir James Fitzjames Stephen, *A History of the Criminal Law in England* (first published 1883, Macmillan, London).

¹³⁴ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.22.

¹³⁵ Claire Valier ‘Durkheim, the Dreyfus Affair and the Passion of Punishment’ in *Theories of Crime and Punishment* (Longman 2002) p.29.

¹³⁶ Literally, the law of retaliation.

¹³⁷ Andrew von Hirsch, *Doing Justice – The Choice of Punishments: Report of the Committee for the Study of Incarceration*, (North Eastern University Press 1976). p.66.

¹³⁸ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.2.

In this analysis, retributive desert is not vengeance, but exactly as the name suggests, it means that an offender attracts *what he deserves* for committing the crime. The system assesses guilt on two grounds: firstly, the seriousness of the offence and the harm caused; and secondly, the blameworthiness of the offender. Tariffs, taking both of these things into account, ensure *proportionality*. The leaders of the Enlightenment in Europe envisaged a State in which corruption would be kept to a minimum through a recognition that individuals had free will. Political and legal decisions were no longer to be made according to the divine right of Kings, but through the power of the people. For mercy, this meant a transition from a system in which pardons and mercy were a common exercise of power to a situation in which they became mistrusted for being an abuse of it. Kant shared this distrust, as will be seen in Chapter 3.

Retributivist punishment is based on the idea of desert, not in the sense of equal punishment, but in the sense of proportionate punishment, commensurate with the crime committed. An offender is also punished for his moral culpability in addition to his blameworthiness. This indicates a public protection agenda that would seem to have bypassed the original aims of the just deserts model, which was set to protect the innocent from conviction and ensure that those who are guilty were dealt with in a fair and proportionate manner. Instead, a more punitive, retributive model of punishment is emerging. The mandatory sentencing provisions in the Criminal Justice Act 2003¹³⁹ demonstrate a harsher retributive approach than the one adopted previously. There is even less room for mercy, following this approach.

3.2 The philosophical background: the influence of Kant

It has long been recognised that, to a substantial degree, these Western norms and ideals of criminal justice and punishment are drawn from the moral philosophy of Immanuel Kant. According to Meyer, these ideals are based on a skewed notion of Kant's moral (and legal) philosophy, which she has described as a 'kanticism'¹⁴⁰ – a sort of catechism or set of commandments of Kantian ideals, mainly to do with a universal understanding of the subject-citizen. The latter is seen as the 'reasonable'

¹³⁹ Criminal Justice Act 2003 s.142.

¹⁴⁰ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.10.

man or the individual agent, who transgresses and commits a criminal offence. In such a world, there can be no place for mercy and/or forgiveness, as the perfect legal system has no need of it, as it always makes fair decisions. Furthermore, there is no need for merciful judgments to be made, as to allow these would be to undermine the rights of the citizen, being a usurpation of these rights of a sovereign. This conception of both the ideal legal system, and the ideal subject-citizen will be challenged in this thesis. The false ideal has left no room for mercy and forgiveness.

In particular, the insistence of the criminal law on the concept of blameworthiness and the idea of mens rea emphasises the reasoned individual, responsible for his own fate.

Kant's moral philosophy is contained over a number of major works, the most famous being the three Critiques: of *Pure Reason*¹⁴¹, of *Practical Reason*¹⁴², and of *Judgment*¹⁴³. However the majority of his thought on morality (and certainly that part which may be said to pertain to legal theory) is contained in the *Groundwork for the Metaphysics of Morals*¹⁴⁴. Also pertinent to this discussion is his work on the *Philosophy of Law*¹⁴⁵ and *The Metaphysical Elements of Justice*¹⁴⁶. This last work contains Kant's thoughts on pardon. In these works, he sets out his vision of a moral philosophy of the will, duty and the role of the State. The notion of the criminal was developed from these ideals of moral philosophy. This moral philosophy can be summarised as follows: In the search for a theory of knowledge, philosophical enquiry centered on the contrast between that knowledge which we can gain through experience, and that knowledge which is objective, that is, which does not require experience to be proven to be true. Kant was influenced both by a rationalist and empiricist point of view:

rationalism derives all claims to knowledge from the exercise of reason, and purports to give an absolute description of the world, uncontaminated by the views of any

¹⁴¹ Immanuel Kant, *Critique of Pure Reason* (trans. J. Meiklejohn, Dover Publications 2003).

¹⁴² Immanuel Kant, *Critique of Practical Reason* (trans. W. Pluhar, Hackett Publications 2005).

¹⁴³ Immanuel Kant, *Critique of Judgment* (trans. J. Bernard, Dover Publications 2005).

¹⁴⁴ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Translated and analysed by H.J. Paton, Routledge 1991).

¹⁴⁵ Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (trans. W. Hastie, T. & T. Clark, Edinburgh 1887).

¹⁴⁶ Immanuel Kant, *The Metaphysical Elements of Justice in The Metaphysics of Morals Part I* (trans. J Ladd, Hackett 1999).

observer. Empiricism argues that knowledge comes through experience alone; there is, therefore no possibility of separating knowledge from the subjective condition of the knower. Kant wished to give an answer to the question of objective knowledge that was neither as absolute as Leibniz's nor as subjective as Hume's.¹⁴⁷

There are two main aspects in his thought, which are relevant to the present discussion: first, that the ability to reason is a core part of existence. Secondly, that in a society, individuals have come together and agreed to punishment, should they transgress. These ideas are explored below. In particular, I will consider how they explain that any reduction of punishment (in the form of mercy, clemency or forgiveness) is not possible.

Kant believed there was a realm of reason that did not reside outside in a metaphysical system, but in the self – free will is intrinsically moral. In this way, man is an end in himself, capable of entirely rational thought, independent of experience. Answers about the existence of God or the place of man in society, were not to be found in the natural order or in experiences as Hume and other empiricists had suggested, but rather solely in man's capacity for reason:

there is a core part of every individual which remains pure apart from experience and which is not subsumed in metaphysics.¹⁴⁸

This means that our way of thinking, our cognitive ability has a sense of unity. This forms a crucial part of the way in which Kant's moral philosophy has been adapted and adopted as the basis for our attitude to criminal law and punishment. We are individual, accountable subjects, responsible for our own fate.

this principle of humanity, and in general of every rational agent, as an end in itself is not from experience ...it is universal...and so must spring from pure reason.¹⁴⁹

This includes a decision to commit crime and to accept punishment for transgressions. In turn, this can explain the reluctance of such a system to allow anything into legal decision-making which has to do with the emotions rather than reason. As

¹⁴⁷ Roger Scruton, *Kant: A Very Short Introduction* (Oxford University Press 2001) p.21.

¹⁴⁸ Ian Ward, *Critical Legal Theory* (Cavendish 2004) p.56.

¹⁴⁹ Immanuel Kant, *Groundwork of the Metaphysic of Morals* (Trans H.J. Paton, Routledge 1991) p.93

autonomous free thinking individuals, we are free agents responsible for our own moral choices, and subject only to the moral law within ourselves, borne out by Kant's famous statement:

two things fill the heart with ever renewed and increased awe and reverence, the more often and the more steadily we meditate on them: the starry firmament above and the moral law within.¹⁵⁰

The link between morality based on reason and legal principle has also been noted by Valier:

Enlightenment thinkers sought a rational and humane social order in contradistinction to the arbitrary power of absolute monarchy. The Enlightenment was a project which especially sought to create its actuality through law and the law reflected and condensed Enlightenment thought in practice.¹⁵¹

However, we do not simply subsist as individuals, but as part of society. In the perfect society, reasonable beings come together and work out laws for themselves. In this way, we form a 'kingdom of ends', a society in which everyone contributes by following his duty:

every rational being is one who must regard himself as making universal law...I understand by kingdom a systematic union of different rational beings under common laws...for rational beings all stand under the law that each of them shall treat himself and all others never merely as a means but as an end in himself.¹⁵²

The 'man of reason' was the foundation of the modern law, as Valier notes¹⁵³. More than this, reason was necessary, in order to create a better society. This is the main characteristic of what was to become known as 'positive' law:

the writings of the Enlightenment thinkers are seen as emblematic of the emergence of distinctively modern ways of thinking because they emphasized the power of reason to produce a better ordered society.¹⁵⁴

Justice in the community requires the 'glue' of reason¹⁵⁵. With regard to punishment,

¹⁵⁰ Immanuel Kant, *Critique of Practical Reason* (trans, W Pluhar, T Abbott, Hackett Publishing 1996) p.191

¹⁵¹ Claire Valier, 'From Enlightenment Jurisprudence to the Born Criminal' in *Theories on Crime and Punishment* (Longman 2002) p.6.

¹⁵² Immanuel Kant, *Groundwork of the Metaphysic of Morals* (Translated and analysed by H.J. Paton, Routledge 1991) p.95.

¹⁵³ Claire Valier, 'From Enlightenment Jurisprudence to the Born Criminal' in *Theories on Crime and Punishment* (Longman 2002) p.6.

¹⁵⁴ Claire Valier, 'From Enlightenment Jurisprudence to the Born Criminal' in *Theories on Crime and Punishment* (Longman 2002) p.7.

since the decision to commit crime is made rationally, so the individual is entitled to punishment. Kant sees this as the reasonable act of an individual in a reasonable community:

mutuality of reason that links us together can form a larger state-like community of reasonable beings through a 'kingdom of ends' in which reasonable beings come together and work out reasonable laws for themselves. These laws, based on reason, will necessarily be consistent and harmonious, forming the basis of an ethical community and an ideal state.¹⁵⁶

In this system, anything, that is not rational is not law. Those who are irrational are not criminally responsible (such as in the defence of insanity). Likewise, emotion and feeling are not admitted. This can be seen in the substantive law, with its insistence on blameworthiness, individual responsibility and agency. The focus is not on the harm caused by the crime, but on the mental state of the offender at the time of committing it. Criminal liability is determined less on the basis of what happened, than on the mental processes that allowed it to occur:

the core of criminal law doctrine, centred around the concept of mens rea and a variety of criminal excuses, probably comes closer to any other set of social practices to an instantiation of the Kantian conception of the responsible human subject as the noumenal self, characterised exclusively by a rational free will unencumbered by character, temperament and circumstance.¹⁵⁷

Having reason as the primary guide to good moral behaviour, Kant developed the idea of the *categorical imperative*. Kant defined it in the following way:

I ought never to act except in such a way that I can also will that my maxim would become a universal law.¹⁵⁸

Those who lead the community have a categorical imperative - a moral duty to punish those who have committed crimes. Failure to do so would be a dereliction of the duty with which they have been entrusted by those who have elected them. This duty includes the duty to punish those in the community who have transgressed according to an application of reason and individual responsibility. In theory, there can be no

¹⁵⁵ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.9.

¹⁵⁶ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.13

¹⁵⁷ Meir Dan-Cohen, *Harmful Thoughts: Essays on Law, Self, and Moralising* (Princeton University Press 2002) p.236 cited in Linda Ross Meyer, *The Justice of Mercy*, p.15.

¹⁵⁸ Immanuel Kant, *The Metaphysical Elements of Justice in The Metaphysics of Morals, Part 1* (trans John Ladd, Hackett Publishing 1999) p.140.

exceptions to this duty – there can be no mercy shown to those who have exercised a free choice. This is illustrated by Kant’s famous ‘last murderer’ statement:

even if a civil society were to dissolve itself by common agreement of all its members...the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth (in proportion to their inner viciousness, and so that the bloodguilt thereof will not be fixed on the people.. as accomplices in a public violation of legal justice.¹⁵⁹

In this society, anyone who commits crime should get what they strictly deserve under the laws agreed to by the citizens of the perfect society. In this way, no one would be guilty of an injustice.

The duty to obey the law is required in exchange for the freedom gained. This contractual obligation continues, even if society does not, as it is a mark of dignity and respect for all those who take part. The idea of dignity and self-respect is a crucial one for forgiveness. This understanding of forgiveness does not depend on conditions or the politics of exchange:

the basis of this uprightness of law – or more precisely, *Recht* – is that uprightness is rooted in the respect of the dignity of all others. Thus, even if the specific social contract is dissolved, respect for the possibility of the reconstitution of ‘Right’ is maintained as long as the dignity of humanity is respected through the exactment of retribution.¹⁶⁰

If we choose to behave in a way that offends the criminal law (given that criminal laws are conceived by rational free thinking individuals), we are happy to accept the consequences of those actions and will even demand the correct punishment to ensure our return to society once the punishment is spent. A rational being will naturally be guided to the right result, and cannot disagree with punishment, given his prior agreement that in the event of transgression an individual actor will be punished. He is, in fact, entitled to that punishment and should/would seek it out.

when I enact a penal law against myself as a criminal it is the pure juridical legislative reason (*homo noumenon*) in me that submits myself to the penal law as a

¹⁵⁹ Immanuel Kant, *Groundwork of the Metaphysic of Morals* (Translated and analysed by H.J. Paton, Routledge 1991) p.67.

¹⁶⁰ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.68.

person capable of committing a crime, that is another person (homo phaonomenon) along with all the others in the civil union who submit themselves to this law.¹⁶¹

The 'social contract', therefore, creates a just state through this agreement to make certain sacrifices, to limit freedom, in as much as other citizens do the same. In exchange, the citizen deserves protection. The law-breaker takes liberties that he cannot grant to others, and thus interferes with the will of others. Punishment redresses this balance. In other words, there is an agreement between the responsible moral subject and the moral community made of many units of individuals responsible for their own moral life.

The subject-citizen has entered into a sort of social contract in which he agrees to lose certain liberties in exchange for the protection of the law and in exchange for the assurance that those who gain an unfair advantage over others by committing crime will be punished. In the context of the social contract, the committer of crime has gained an unfair advantage, which must be rebalanced by appropriate punishment.

The idea is that in a fair society, which encourages obedience to the law, there is a quasi-contractual relationship between state and citizen that ensures that the citizen's liberty is protected. The sacrifice that the citizen makes in exchange is the giving up of freedom. If one individual does so, then so will others, thereby, creating a sort of benefit and burden arrangement. The right to punish arose from this idea of granting the citizen this free will and responsibility.

Alternatively, the arrangement can be seen as a distribution of equal shares of freedom balanced by obligations.

3.3 Retributivism, moral judgment and alienation

In the perfect society in which all have agreed to rule by a sovereign who exercises the people's power, a person who harms another in the broadest sense gains an unfair advantage over the victim. In terms of mercy and forgiveness, Dean Moore proposes the following: if mercy is a reduction of punishment due to the offender's personal

¹⁶¹ Immanuel Kant, *Metaphysical Elements of Justice*, (Bobbs Merrill, 19650 p.36 cited in Alan Norrie, *'Law, Ideology and Punishment, Retrieval and Critique of the Liberal Ideal of Criminal Justice'* (Kluwer Academic Publishers 1991) p.53.

circumstances, it sits uneasily with the idea of desert. Punishment is a categorical imperative. Therefore, pardon (or its cousins, forgiveness and mercy) is an injustice – the opposite of desert. Legal retributivist punishment deals with the idea of the defendant causing the harm as gaining an unfair advantage in society by committing the crime for which he must pay through punishment. We also wish to punish offenders for their *moral* transgressions, in other words, for being morally ‘bad’. Jeffrie Murphy, whose defence of the exclusion of forgiveness and mercy we will consider later in this thesis, calls this ‘deep character judgment’.¹⁶²

The advantage from legal retributivism may be material in the case of theft, or it may be a representation of power in a rape charge. According to Morris, for example:

it is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased. Another way of putting it is that he owes something to others, for he has something that does not rightfully belong to him. Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.¹⁶³

The problem is, that on this analysis of retribution, mercy cannot be tolerated as we are only focusing on what advantages the offender has gained by committing the crime. The public reaction does not matter, and the character of the offender is irrelevant. This guards against the injustice of punishing similar offences with different degrees of severity, or of imposing the same punishment for offences of different gravity. In her assessment of the place of pardons in criminal law and punishment¹⁶⁴, Kathleen Dean Moore applies a benefit and burden analysis of retributivism. Pardons for this type of retributivism are possible, but must be treated with caution. This means a cautious approach should be exercised with regard to forgiveness:

it is important to see that the equilibrium may be restored in another way. Forgiveness—with its legal analogue of a pardon—while not the righting of an unfair

¹⁶² Jeffrie G. Murphy, *Punishment and the Moral Emotions: Essays in Law, Morality and Religion* (Oxford University Press 2012).

¹⁶³ Herbert Morris, *On Guilt or Innocence: Essays in Legal Philosophy and Moral Psychology* (University of California Press, 1976) p.34

¹⁶⁴ See generally Kathleen Dean Moore, *Pardons: Justice, Mercy and The Public Interest* (Oxford University Press, 1989).

distribution by making one pay his debt is, nevertheless, a restoring of the equilibrium by forgiving the debt. Forgiveness may be viewed, at least in some types of cases, as a gift after the fact, erasing a debt, which had the gift been given before the fact, would not have created a debt. But the practice of pardoning has to proceed sensitively, for it may endanger in a way the practice of justice does not, the maintenance of an equilibrium of benefits and burdens. If all are indiscriminately pardoned less incentive is provided individuals to restrain their inclinations, thus increasing the incidence of persons taking what they do not deserve.¹⁶⁵

She then goes on to introduce the idea of moral retributivism¹⁶⁶. The offender must be punished not just because he has gained an unfair advantage, but in also because he is *morally wrong* in making the decision that he does. This idea is closer to the traditional view of desert – the *lex talionis*. It can also be seen, according to Moore, as a sort of ‘moral alchemy’¹⁶⁷, whereby evil is transformed into good through the possibility of vengeance.

The basic position of this type of retribution is that people do not deserve to be punished, unless their violation of the law is due to an evil character. Punishment stems from the judgment that a given offender is an evil person. According to Dean Moore, moralistic retribution means that we must measure the seriousness of moral wrongdoing, measure the seriousness of punishment and then match these.

As shown earlier, both of these aspects of retribution are entrenched in our present criminal justice system. As we shall see, neither can accommodate mercy and forgiveness, except in very limited circumstances. A personal gesture of forgiveness may be a way, however, of separating the offender from his act.

The idea of character judgment is one that permeates the debate on forgiveness. Jean Hampton calls this ‘moral hatred’. Forgiveness can help with this. Before it can take place, however, an important process takes place. According to Hampton, the victim needs to regain a sense of his own self-worth or re-approval¹⁶⁸. In her view, there is a need for repentance. This is a different way of regaining the self-respect to which Murphy alludes. To my mind, this is still a rather narrow view of forgiveness, which I

¹⁶⁵ Herbert Morris ‘Persons and Punishment’ (*The Monist* Vol.52:4, 1968) p. 475–501.

¹⁶⁶ Kathleen Dean Moore, *Pardons: Justice, Mercy and The Public Interest* (Oxford University Press 1989), chapter 10.

¹⁶⁷ Kathleen Dean Moore, *Pardons: Justice, Mercy and The Public Interest* (Oxford University Press 1989), p.108 (term attributed to HLA Hart).

¹⁶⁸ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988).

do not see as dependent on apology. This does not mean an apology cannot take place, should the offender wish to provide it. In Meyer's words, mercy is a

gift to the guilty, an ethical obligation, (it is) to risk and to open oneself up to a vulnerable connection to others for no reason, simply because that is who we are.¹⁶⁹

Tutu also refers to the need to separate the crime from the criminal and John Braithwaite's reintegrative shaming proposal¹⁷⁰ in the context of restorative justice gives this idea central importance. I will argue later that forgiveness is one way in which this separation is possible. If forgiveness is a response to the crime, but not to the criminal, then, we can, in theory, separate the two. Therefore, in deciding whether retribution can accommodate mercy, we must distinguish between the types of retribution. In terms of the second type, that of pure moral judgment, it may be possible to see a place for mercy and forgiveness. Forgiveness is a way to allow the defendant to be a person, not a 'moral monster'.¹⁷¹ Archbishop Tutu raises this issue in relation to forgiveness, and makes the point that this separation makes the defendant more responsible for his actions, not less. In the context of the perpetrators of dreadful deeds in apartheid South Africa, he argues:

you wondered what had happened to the humanity of someone that they could be able to do this. Quite rightly people were appalled and said people guilty of such conduct were monsters or demons. We had to point out that yes indeed these people were guilty of monstrous, even diabolical, deeds on their own submission but, and this was an important but, that did not turn them into monsters or demons. To have done so would mean that they could not be held morally responsible for their dastardly deeds. Monsters have no moral responsibility.¹⁷²

There are, however, circumstances in which mercy may be justifiable on retributivist grounds. If the offender is not legally deserving of punishment, then a pardon is acceptable. In fact, if this is the case, it is an obligation. In a case of moral desert but no legal liability, pardon is necessary. In a case of legal desert, but no moral desert, pardon is possible. So pardons are *required* where there is no legal liability, and

¹⁶⁹ Linda Ross Meyer, *The Justice of Mercy* (The University of Michigan Press, 2010) p.50.

¹⁷⁰ See generally, John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989).

¹⁷¹ Trudy Govier, *Forgiveness and Revenge* (Routledge 2002). See generally chapter 7 'Monstrous Deeds, Not Monstrous People'.

¹⁷² Archbishop Desmond Tutu, *The Longford Lecture: The Truth and Reconciliation Process: Restorative Justice* (The Longford Trust 2004).

allowed where there is legal liability without moral culpability¹⁷³. Dean Moore suggests limitations/examples where pardon may be possible in a retribution-led society, in case of ‘unfortunate guilt’¹⁷⁴. This discussion is relevant to our understanding of how forgiveness may work. I will show that forgiveness, which may happen despite punishment, is a way of acknowledging the essential goodness of the perpetrator, whilst censuring his criminal act.

3.4 Kant’s own objections to forgiveness and mercy

The first objection to mercy in a Kantian system of punishment must be that it fails to be rational. Since rationality can be the only source of morality, it is also immoral. Furthermore, mercy is demeaning because it denies the offender the right to earn his re-inclusion in society.

This view has been expressed by Kant:

The law concerning punishment is a categorical imperative and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount if it...¹⁷⁵

Kant, therefore, viewed forgiveness and mercy as an unnecessary adjunct to a perfect system. If all citizens had agreed to the social contract and accepted the sovereign’s right to punish, then mercy would only serve to undermine that given and exercisable power. So, mercy threatens rational law, because it is an emotional, irrational response, or as Meyer puts it, the ‘mad woman in the attic of law’¹⁷⁶.

In a common law system such as the models described above, forgiveness would be unnecessary as judges would always make fair and considered decisions, since the law would be clear (in the code) and proportionate, so there would be no need for additional leniency. To allow it, would not only compromise the perfect legal system, but would also be condescending to the wrongdoer whose right it is to demand

¹⁷³ Kathleen Dean Moore, *Pardons: Justice, Mercy and The Public Interest*, (Oxford University Press 1989).

¹⁷⁴ Claudia Card, ‘On Mercy’ *Philosophical Review*, vol 81 pp.181-207.

¹⁷⁵ Immanuel Kant, *The Metaphysic Elements of Justice* (Hackett Publishing 1999) p.138.

¹⁷⁶ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.3.

punishment.

The Kantian perception of punishment as a right and expectation, and mercy as an irrational adjunct to that perfect system can be found in early theories of retributive penal policy. The Italian philosopher Cesare Beccaria, whilst a utilitarian view, still echoes the Kantian position in the following quote:

ought to shine in the legal code and not in particular judgements...to show men that crimes can be pardoned, and that punishment is not their inevitable consequence, encourages the illusion of impunity and induces the belief that since there are pardons, those sentences which are not pardoned are violent acts of force rather than the products of justice¹⁷⁷

Kant made it clear that despite some inconsistencies, the sovereign who pardons against the people is a usurper, and is doing his people an injustice by passing up an opportunity to correct an injustice brought about by a crime.¹⁷⁸

It is of course worth remembering the social context in which Kant wrote. Norrie notes that pardons were commonplace, especially in sixteenth century England. In effect, the system of pardons had political capital and was, in fact, a way for the state to create and then hold on to sovereign power:

the common people were both cowed by and made grateful to their betters by this manipulative ideological cocktail of terror.¹⁷⁹

It does not lie in the power of a judge to exert mercy on another. This power lies in the hands of the people. In this way, an injustice would be done to the people, if one allowed it. A pardon violates the right of a citizen, not the sovereign – unless this is an injury to the sovereign himself:

With respect to a crime of one subject against another, he absolutely cannot exercise this right, for in such cases exemption from punishment constitutes the greatest injustice towards his subjects.¹⁸⁰

This demonstrated Kant's concern for other citizens in the community, not just the

¹⁷⁷ Cesare Becarria, *Of Crimes and Punishments and On Other Writings* (eds Richard Bellamy, Cambridge University Press, 1995). p.111.

¹⁷⁸ Immanuel Kant, *The Metaphysic Elements of Justice* (Hackett Publishing 1999) p.138.

¹⁷⁹ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Butterworths 2001) p.16.

¹⁸⁰ Immanuel Kant, *The Metaphysical Elements of Justice* in *The Metaphysics of Morals, Part 1* (trans John Ladd, Hackett Publishing 1999) p.144.

individual. We can say that forgiveness, in contrast to the power of mercy exercised by a judge in 'sympathy', is essentially a change of heart, a personal choice on the part of the victim to 'let go' of feelings of resentment. Traditionally, in adversarial criminal processes, the victim's feelings must be separated from the process of trying the defendant in the interest of justice. Dean Moore describes the idea of retributive forgiveness as discordant:

it seems silly to look to retribution for any insight into forgiveness and mercy, because retribution suffers from such a nasty reputation woe-to-him retribution, atavistic, relentless, vengeful.¹⁸¹

The emotional will of the victim is seen as too subjective to have any legal force. However, it might be argued that emotional will is appropriate, if the role of the emotions is properly recognised:

criminal punishment is not about forgiveness, and yet the values and processes celebrated in forgiveness may inform punishment decisions, even for serious criminality.¹⁸²

For Kant, forgiveness is a virtue. That virtue, is a duty, however.

it is a duty of virtue not only to refrain from repaying another's enmity with hatred out of mere revenge but also never even to call upon the world-judge for vengeance partly because a man has enough guilt of his won to be greatly in need of forgiveness, and partly indeed especially because no punishment no matter from whom it comes, may be inflicted out of hatred...hence men have a duty to cultivate a conciliatory spirit. But this must not be confused with placid toleration of injuries, renunciation of the rigorous means for preventing the recurrence of injuries by other men.¹⁸³

This is a curious statement. If the virtue of forgiveness is a duty, then it is on a par, as a duty, with the duty or the categorical imperative to punish. For Hastings:

it is one of the great embarrassments of retributive theory that it is unable to give any account of forgiveness.¹⁸⁴

The fact that Kant thinks that duty is a virtue is similar in some ways to Shakespeare's

¹⁸¹ Kathleen Dean Moore, *Pardons, Mercy and the Public Interest* (Oxford University Press 1989) p.181.

¹⁸² Sam Pillsbury 'Review Essay: Learning from Forgiveness' *Criminal Ethics*, John J. Kleinig, eds. Loyola-LA Legal Studies Paper No. 2009-4. <<http://ssrn.com/abstract=1341980>> accessed May 2013.p.137.

¹⁸³ Immanuel Kant, *Groundwork of the Metaphysic of Morals* (Translated and analysed by H.J. Paton, Routledge 1991) p.96.

¹⁸⁴ Hastings Rashdall, *Theory of Good and Evil* (Clarendon Press 2005) p.306.

definition of mercy as a perfection. For Kant, as a citizen, I must do anything I can to be a better member of a community, and to contribute to that community's success and happiness. The duty of virtue, therefore would accord with self-respect. A victim who forgives, presumable, gains strength from this, and some control over the situation.

I now turn to some readings of Kant and interpretations of his views. Ian Edwards is sceptical of the use of forgiveness in sentencing. He argues that whilst forgiveness is to be welcomed as an important part of the healing process for a victim of crime, it has no place in the legal process of punishment:

while forgiveness is to be welcomed as a moral quality with social benefits, we need to think very carefully before giving it any weight in the outcomes of the sentencing process.¹⁸⁵

Allowing forgiveness a place threatens the key concepts of proportionality – allowing forgiveness to be part of the sentencing process compromises the idea of proportionate punishment. It also undermines consistency and leads to arbitrary decision making, and allows the offender to avoid legal responsibility for his actions.

The prevailing view seems to be that incorporating it at all into the law would jeopardise the common law notions of according the defendant rights in a criminal trial. If any account is to be taken of forgiveness, then this system is automatically compromised. Furthermore, it would introduce an unpredictable and arbitrary factor, which would undermine consistency within a system. The subjective view of a vengeful victim could upset the balance of a clear and accountable model of justice. In *Mills*, the court said:

as a matter of principle the victim of a crime cannot tell the court that because he or she has forgiven the perpetrator the court should treat the crime in effect as if it had not happened....but we take her evidence into account as indicating the current extent of impact of this particular crime in the victim.¹⁸⁶

The author highlights the fact that what the Court of Appeal is trying to do is to fit notions of forgiveness into a system which is guided by the principle of

¹⁸⁵ Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of 'Their' Offenders'[2002] Crim LR 689.

¹⁸⁶ (1998) 1 Cr App R 43.

proportionality. The only way it seems able to do this is by linking forgiveness with a lack of harm. In doing so, Edwards states, it fails to acknowledge a state of affairs in which a victim may be able to forgive while still suffering¹⁸⁷. As yet, there is no proper penal framework for incorporating forgiveness. This aspect of victim's involvement in sentencing will be considered in Chapter 6 when I discuss compassion and the emotions in criminal law. In particular, I will discuss the role of the new form of victim personal statements, which the victim now has a right to make. The courts seem to have a difficult task in hearing stories of forgiveness, but in having to disregard them for the purposes of sentencing.

3.5 Retributivism, self-respect and the values of vindictiveness

Jeffrie Murphy, a staunch defender of the Kantian position, is interested in the connection of the passions, feelings and emotions to moral and legal philosophy.

I am particularly interested in the degree to which certain moral and legal doctrines are rooted in the specific passions and the degree to which a philosophical examination of those passions will have a bearing on an understanding and evaluation of those doctrines that they in part generate.¹⁸⁸

He is sceptical of forgiveness on both a cognitive and an emotional level. Murphy seems to suggest that only *certain* emotions should be emphasized – those of the vindictive passions (as long as these are not excessive) - but others like the 'passion' or emotion of compassion must be kept in the private realm. This will be discussed further in Chapter 6. Kant had also distinguished between the 'affect' (emotion) of anger and the 'passion' of vindictiveness. The former was acceptable, the latter not.¹⁸⁹

According to Murphy, the passions of resentment are legitimate feelings that must be given credence by the law, which in turn gives them institutional effect. To dismiss feelings such as vindictiveness for being strong, inappropriate emotions may be the wrong thing to do, since to feel and express these passions is an assertion of our individuality and identity as Kantian beings, with free will and our rational natures. In

¹⁸⁷ Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of 'Their' Offenders' [2002] Crim LR p.689.

¹⁸⁸ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.2.

¹⁸⁹ Patrick Frierson Kant's Empirical Psychology (Cambridge University Press, 2014), p.221.

the context of criminal law, Murphy argues that easy forgiveness ignores the important function of punishment as a tool of crime prevention. This includes the offender who must be accorded the dignity of just punishment, rather than being regarded as a victim (of his upbringing, of society):

if I count morally as much as anyone else (as surely I do) a failure to resent injuries done to me is a failure to care about the moral value incarnate in my own person, (that I am, in Kantian language, an end in myself) and thus a failure to care about the very rules of morality.¹⁹⁰

If we fail to acknowledge the passion of resentment, we lack self-respect. If the definition of forgiveness is the foreswearing of resentment (Bishop Butler), then Murphy thinks that that resentment functions in defence of self-respect. In this way, self-respect (and respect for others and the community) is inextricably linked to resentment, which can be seen as healthy, and makes forgiveness into a vice, not a virtue. A too hasty willingness to forgive wrongdoing means that the forgiver has no rights or is refusing to take rights seriously:

if I act with reason, then I will that I be treated the same way in similar circumstances. Thus if we respect the criminal as an actor we should give him his punishment, the punishment he has in a way decreed for himself. To treat him any differently – to mitigate or excuse his act – is to deny him his free will and personhood, to see him as subject to the forces of causes and effect rather than able to act.¹⁹¹

I will argue that, in fact, self-respect comes from an acknowledgement of the offender as ‘other’, and that failure to acknowledge the right of those victims who wish to forgive is equally wrong. We cannot have double standards. If resentful passions are justified, why not the soft ones, such as forgiveness? Perhaps forgiveness is too easily rejected as ‘flabby sentimentality’.¹⁹² Murphy’s framing of forgiveness in this way is short-sighted, as it disrespects the victim’s choice to forgive. This is a loss of self-respect, too. Also, Murphy’s argument assumes that forgiveness means a loss of power. In fact, stories of forgiveness show that victims tend to feel empowered, rather than weakened when they show forgiveness.

¹⁹⁰ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.18.

¹⁹¹ Linda Ross Meyer, ‘Forgiveness and Public Trust’ (*Fordham Urban Law Journal*, volume 27, Issue 5, article 33, 1999) p.1528.

¹⁹² Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.32.

Murphy also argues that the loss of power lead to degradation:

when I am wronged by another, a great part of the injury over and above any physical harm I may suffer is the insulting and degrading message that has been given to me by the wrongdoer, the message that I am less worthy than he is. ...thus failing to resent the wrongdoer (or hastily forgiving) runs the risk that I am endorsing the immoral message for which the wrongdoer stands...if the wrongdoer repents however, he now joins me in repudiating the degrading and insulting message, allowing me to relate to him (as his new self) as an equal without fear that a failure to resent him will be a failure to resent what he has done.¹⁹³

The only way to avoid this loss, for Murphy is for a wrongdoer to repent before forgiveness can take place, so as to avoid the insult and lack of self-respect this would entail. However, this type of repentance cannot be forced.

For Murphy, forgiveness is a virtue, but only in the private realm. He thinks that vindictiveness is dismissed too often as cruel evidence of the extremes of retribution, when, in fact, it should be seen as evidence of self-respect and respect for the moral order. He develops this argument further in this way. He does acknowledge, however, that forgiveness is possible in personal relationships:

forgiveness heals and restores; and without it, resentment would remain an obstacle to many human relationships we value.¹⁹⁴

And here, not rejecting forgiveness outright:

in this sense we do need and desire forgiveness and would not want to live in a world where the disposition to forgive was not present and regarded as a healing, restoring virtue. Given that this is the sort of world we all need and want, is it not then incumbent upon each of us to cultivate the disposition to forgive – not the flabby sentimentality of forgiving every wrong, no matter how deep or unrepented, but at least the willingness to be open to the possibility of forgiveness with some hope and some trust? Only a person so arrogant as to believe that he will never wrong others or need to be forgive by then could in Kantian language consistently will membership in a world without forgiveness.¹⁹⁵

¹⁹³ Jeffrie G. Murphy, *Getting Even: Forgiveness and Its Limit* (Oxford University Press 2003) p.35.

¹⁹⁴ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.17.

¹⁹⁵ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.32.

It must, however, remain a private emotion. Surprisingly, he does not entirely exclude it and acknowledges the contradictions inherent in any form of the quest for justice:

in the sense we do all need and desire forgiveness and would not want to live in a world where the disposition to forgive was not present and regarded as a healing and restoring virtue.¹⁹⁶

Forgiveness, if given at all, can only be bestowed for a moral reason. Deep character judgment or assessment of the offender as a bad person must be avoided. This position does not seem to square with Murphy's general anti-forgiveness stance. The moral reasons could be where the offender has repented. Therefore, forgiveness must have conditions attached. Alternatively, he must have had good motives, have already suffered enough or we are forgiving them for old times sake.¹⁹⁷

This seems to me to be a dismissal of the possibilities of forgiveness. It refuses to acknowledge that victims do want to forgive, and that forgiveness should not simply be rejected out of hand. The emotions are already part of the law, forgiveness could be too. Some of the points Murphy makes are disguised as other legal constructs but not called mercy. For example mercy killing often attracts a lenient sentence but we do not call it mercy. This will be examined further in Chapter 6.

I now move to a summary of these Kantian objections to mercy and forgiveness.

3.6 The balance of virtue and duty

In this chapter I have examined the main reasons that mercy and especially forgiveness are excluded from the Kantian ideal. I started the chapter by presenting a theory of retributivist punishment and desert, from the harsh retribution of the *lex talionis* to the 'softer' retributivist principles of today, which emphasise proportionality and 'civilised' justice rather than 'an eye for an eye'. The idea that a retributivist philosophy of punishment punishes both the resulting harm and the moral character of the defendant was considered, with its impact on the possibility of forgiveness, either by a judge or a merciful victim.

¹⁹⁶ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.32.

¹⁹⁷ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.24.

The idea that the criminal law traditionally ‘institutionalises resentment’¹⁹⁸ was considered. The moral and legal philosophy of Immanuel Kant was discussed. Punishment, for Kant, is a moral duty or a categorical imperative. Mercy might be part of this, as long as, it is part of that which the defendant or perpetrator *deserves*. This is the key to Kant’s notion of punishment, which is based on the idea that as citizens of a given State, we have entered into a social contract in which we agree that punishment will follow any transgression. This agreement is made because we are reasoned, autonomous individuals, capable of moral, right decisions.

This system excluded mercy and forgiveness. Mercy is generally excluded, along with pardons, because it is unreasonable and the penal law has no need of it. Mercy is unfair, arbitrary and inconsistent. Where it has a place in a retributive theory of punishment, it tends to form part of an existing judgment in the form of a justification or excuse, or as part of the mitigation process. What cannot be allowed is any representation from the victim of crime that he or she may want to forgive. Kant was also very critical of pardons on the grounds that they produce unfairness and inconsistency. It is of course worth remembering that Kant lived at a time when pardons were used in an extremely arbitrary manner, often for political or financial gain.

Forgiveness may, Kant concedes, be a virtue, which is practised privately – this is the duty of benevolence. Kant is tolerant of this, again on the grounds of reason. We can apply a universal maxim to this issue. We would all wish to live in a world where our fellow citizens would extend our forgiveness to us should we need it, and, therefore, in our turn, we ought to extend the benevolence of forgiveness to those who need it. However, this does not seem to apply to criminal offenders.

There are several supporters of the Kantian system of criminal law and punishment. In particular, Jeffrie Murphy argues against the use of forgiveness in criminal law, on the basis that a victim who forgives lacks dignity and self respect as a Kantian, autonomous being with free will. It is insulting for the respect of the person who has been harmed to suggest that he or she forgives. I have argued that victims only forgive

¹⁹⁸ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.3-4.

when they are moved to do so, and, contrary to the above argument, the experience can be empowering rather than belittling.

On a practical level, Ian Edwards has argued that the use of forgiveness in criminal law is dangerous, particularly in sentencing, as this practice would threaten fundamental principles of the criminal law such as fairness, consistency and proportionality. Whilst victim personal statements are now an integral part of sentencing, and victims of crime are told that they have the right to produce one, the official line¹⁹⁹ is that these are for the benefit of the victim and do not affect the sentencing process in any way. The role of these statements and an evaluation of them, including an assessment of the expression of forgiveness through them, is explored in Chapter 6, when I explore the jurisprudence of compassion and the use of the emotions in criminal sentencing.

In the next chapter, I will outline some possible arguments against this position. Linda Ross Meyer believes that the Kantian position against mercy and forgiveness is only tenable if reason is accepted as the basis for criminal justice policy. The contradictions inherent in the system have been noted many times, elsewhere, notably in the work of Alan Norrie²⁰⁰. It is possible that these contradictions leave room for the colour and critique²⁰¹ of forgiveness.

In the next chapter, I will present the argument that not only must the Kantian system be challenged, but that also it leaves little room for our relationships with others. This will further develop into an argument that on a philosophy of interconnectedness, in which mercy and forgiveness might be able to operate.

Also, the changing role of victims in the criminal justice process shows that emotions are beginning to have a greater role than previously. The introduction of the Code of Practice for Victims²⁰² and the Victims' Charter²⁰³ demonstrates that the law can no

¹⁹⁹ Code of Practice for Victims of Crime, pursuant to s.33 Domestic Violence, Crime and Victims Act 2004.

²⁰⁰ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press 2000).

²⁰¹ Marty Slaughter, 'Sublime Mercy', [2010] *Law, Culture and the Humanities*, 6(3) pp.436–454.

²⁰² Code of Practice for Victims of Crime, pursuant to s.33 Domestic Violence, Crime and Victims Act 2004.

²⁰³ Code of Practice for Victims of Crime, pursuant to s.33 Domestic Violence, Crime and Victims Act 2004.

longer exclude an expression of forgiveness from a victim who wishes to make it.
Legal judgments increasingly include considerations of compassion.

4. CHALLENGES TO THE RETRIBUTIVE APPROACH

“reason is not the solid, commonplace ground we thought it was but a shadow and a promise or a fleeting hope. Is there another place to start to find the responsibility and community necessary for law? If we cannot find a different account, then we are doomed to chase shadows of justice, to vilify our world as ever unjust, nothing that is can be good enough, nothing that is can be worthy. Nothing is.”²⁰⁴

We saw in Chapter 3 that forgiveness by a victim of crime is generally excluded from the criminal justice system. This is because forgiveness is regarded as an irrational, emotional response of the victim of crime to the harm caused. The risk is that to take account of excessively vengeful feelings would compromise the objectivity of the judge when sentencing. Edwards²⁰⁵ argues that victims should not have the right to have a say in the sentencing process; so far, the Court of Appeal echoes those concerns. Murphy argues that in forgiveness, there is a crucial loss of self-respect in the act of forgiveness, and that there is a value in vindictiveness.

It is also difficult to locate judicial mercy, as the term is frequently confused with mitigation and defences. Mercy from a judge is used in certain undefined circumstances, however, as Card and Smart argue, this should not and does not compromise the retributive ideal. Excuses, defences and mitigation or simply the judgment itself are all ways in which the criminal justice system finds ways to pardon those who would be unjustly punished – a concept that is not easily acknowledged or articulated. One of the key problems is the tendency of Western retributive punishment to insist on moral judgment. This is what Murphy calls ‘deep character judgment’ and Hampton terms moral hatred²⁰⁶. Secondly, the definitions of forgiveness which were explored in Chapter 1 show us that we must be clear on whether, if we are to extend forgiveness, we are right to insist on repentance or apology in exchange for it. The latter is reminiscent of the Kantian version of the social contract.

Concerns about the Kantian system of judgment abound and the problems of a

²⁰⁴ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.24

²⁰⁵ Ian Edwards, ‘The Place of Victims’ Preferences in the Sentencing of ‘Their’ Offenders’[2002] Crim LR p.689 .

²⁰⁶ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988).

Kantian system of law and punishment are well documented²⁰⁷. I do not intend to review or critique in detail the Kantian basis of criminal law, but to review how, with this system as a backdrop, our Kantian approach to mercy, pardons and forgiveness can be critiqued, especially in a society in which victims often seek it out, suggest it, and desire a framework in which to express it. Victims' rights, traditionally excluded from the proportionate legal system, in which the State accuses offenders on behalf of its citizens, have been more prominent lately but to the exclusion of the forgiving victim.

In this chapter, I will explore some of the problems that we can identify with the Kantian view of criminal justice. I will present the thoughts of some opponents to that view, and start to formulate a new theory and practical approach to mercy and forgiveness, both as a theory and in practice.

Opponents of our current Kantian system of law and punishment argue that it is in crisis and full of contradictions:

a recent review of English criminal law judges it to be in a critical condition. Measured against liberal values of legality, fairness and coherence, or its own requirements of accessibility, comprehensibility, consistency and certainty, neither the general nor the special parts withstand scrutiny.²⁰⁸

I will start with the contention of Alan Norrie that the criminal law currently finds itself in a 'critical'²⁰⁹ state, and in examining the problems with the Kantian system. The emerging philosophy is, according to Norrie,²¹⁰ responsible for many contradictions and inconsistencies within the criminal law, despite its claims to logic and universal reason. The quote above refers to the substantive criminal law and contradictions within specific definitions of the criminal law, and especially, of the tension between objective and subjective standards in these definitions. Objective standards of proof and the standard of the reasonable man are commonplace, with scant regard for the individual characteristics or experiences, let alone for the emotions of a particular perpetrator of crime. This approach helps to explain in part

²⁰⁷ See generally, Alan Norrie, *Punishment, Responsibility and Justice: a Relational Critique* (Oxford University Press 2000).

²⁰⁸ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press, 2000) p.1.

²⁰⁹ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press, 2000) p.1.

²¹⁰ See generally Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press 2000).

why emotional responses, such as forgiveness, cannot have a place in the criminal law. The same might be said of the guiding principles governing sentencing policy. Only in mitigation can we validly accept a defendant's individual circumstances, and even then, it is based on very strict criteria. It will be argued, however, that mitigation is not mercy, though it is frequently confused with it.

The problem, according to Norrie, is that in Kantian criminal law and punishment, we have a sanitised version of the subject. This subject is perceived by Kant as a reasonable man who is able to make choices, and accepts that punishment may ensue, should he choose to breach the social contract. This does not take into account the political or ethical nature of the offender. For our study of forgiveness and mercy in the criminal justice system, it means that the perpetrator of crime cannot be assessed according to his personal circumstances, but only according to the harm he has caused and upon his moral culpability. The standards imposed are those applying to the *reasonable* man. This is the standard applied across the substantive criminal law.²¹¹

I will explore some of the problems with the creation of this abstract legal individual. I will consider Alan Norrie's scepticism of the concept and ask whether any of the points he makes can help us to justify forgiveness and mercy. The problem for forgiveness is that the false concept of 'juridical' man ignores any politics and ethics of the subject and also any relationships the subject may want to have with others. If forgiveness is, as I suggest in Chapter 1, an ethical idea, it is excluded from Norrie's argument. This idea is set out here, and developed in subsequent chapters. In applying Norrie's theory of 'confused' and contradictory criminal justice, I will argue that what is needed in relation to forgiveness and mercy is a redefinition of the paradigm.

Secondly, Linda Ross Meyer argues that forgiveness and mercy are only justifiably excluded from the system if we accept that a Kantian version of events is justifiable. She proposes a different philosophical lens, one in which mercy and forgiveness is a possibility. Alongside Meyer, I will explain and analyse this suggestion, arguing that

²¹¹ Changes to the law of homicide (ss54-55 Coroners and Justice Act 2009) and the idea of consent in the Sexual Offences Act 2003 (s1(1)) reflect this.

her work lacks an in depth discussion on the notion of intersubjectivity. In Chapter 7, I will extend Meyer's arguments by showing in detail how criminal law excludes mercy, even in restorative practices, but also how victim forgiveness may be possible, following the example of the Truth & Reconciliation Commission. On this basis, I will suggest a theory of forgiveness based on a jurisprudence of compassion and intersubjectivity.

Other theorists also suggest a different paradigm of criminal law that uses the notion of recognition of our relations with others to find a place for forgiveness and mercy.

This chapter, therefore, seeks to identify the problems with the Kantian position on mercy and forgiveness, and sets the scene for a situation in which victims who desire forgiveness might be allowed to express it. At the same time, judicial mercy must be better articulated. Against Murphy's Kantian defence of vindictiveness, I will argue that self-respect and dignity are not necessarily compromised in allowing those who wish to forgive to have a voice.

4.1 A challenge to the idea of the autonomous individual: Alan Norrie

In a trilogy²¹² that examines the 'critical state' of English Criminal Law and punishment, Alan Norrie finds that Kant's ideal of the abstract rational 'juridical' individual is wanting in one fundamental respect. Largely based on morality and moral values, the criminal law seeks to give us guidelines and principles on how we should live our lives. The problem is that this morality is askew. This means that the entire system is based upon a false premise while the reality of the individual 'signing up' to the social contract is that he lives, works and breathes in his individual circumstances, and is not an abstract being. The political reality of the offender is not reflected in the fictional individual in Kant's morality.

²¹² Alan Norrie, *Law, Ideology and Punishment, Crime, Reason and History and Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press, 2000).

Drawing on concerns raised by the communitarian Alexander MacIntyre, he explains the idea of 'simulacra of morality'.

we possess indeed simulacra of morality, we continue to use many of the key expressions, but we have very largely if not entirely lost our comprehension both theoretical and practical of morality....my aim ...is to consider whether the responsible individual within the criminal law and retributive theory is not indeed better viewed as a simulacrum, a mere appearance of morality. In targeting the individual as the repository of responsibility and separating her off as the context within which she operates, is there not a similar problem within criminal justice thinking which MacIntyre finds within liberal thinking as a whole?²¹³

In other words, Kant's juridical man wishes for individual autonomy and responsibility based on reason, but to the exclusion of the individual's actual location between the personal and the social. This is manifested in a fundamental misunderstanding of the person we are trying to punish:

the conflict between the ideal image of a psychologically responsible subject in both philosophy and law and the realities of crime as a socio-political phenomenon, gives rise to contradictions within legal theory and doctrinal practice²¹⁴

In response to these contradictions and problems, Norrie proposes a

radical critique of the liberal tradition, returning to first principles but subjecting them to fundamental scrutiny could reveal what the root problems of punishment theory are.²¹⁵

We saw in Chapter 3 that there was a link between the moral philosophy of the Enlightenment and rational individualism in the law.

This is because reason is everything. Although the individual has free will to decide how he behaves, those decisions are actually shaped by the political and economic environment in which he lives. In a society practising a desert model of punishment, there is an artificial representation of an individual that has free will and acts as a free citizen, having chosen a sovereign. This 'juridical' individual bears no similarity to real people living in real social, economic and political circumstances. It is, therefore,

²¹³ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press, 2000) p.4-5.

²¹⁴ Alan Norrie, *Punishment, Responsibility and Justice: a Relational Critique* (Oxford University Press 2000) p.46.

²¹⁵ Alan Norrie, *Law, Ideology and Punishment, Retrieval and Critique of the Liberal Ideal of Criminal Justice* (Kluwer Academic Publishers 1991) p.2

a false basis on which to assess a person's moral choices.

the image of the individual established in this period was an ideal one. It was the image of a 'man' as either a metaphysical or calculating, self-interested being, conceived of in an asocial way in a world whose sociality was no more than the coming together in the social contract.²¹⁶

Part of the problem, and the cause of this separation, is that law is fundamentally about the 'exchange' relationship – one's place in society was a contract with rights and free will exchanged for a benign state, which punished only when the situation required it, and then only with the citizen's authority – the operation of the social contract. Within the system, all are free and equal, yet this freedom and equality stands in contradiction to the realities of social life beyond the exchange relation. The society in which exchange has come to predominate, is one in which individuals have been forced and cajoled into exchange in order to survive - regardless of their will in this matter. This, of course, is symbolic of the entire social contract. Kant's idea of the *Rechtstaat*, that is to say, the state which is based upon or governed by the law, has its basis on the need to guarantee the freedom and equality of market exchange:

jurisprudence, in both its liberal natural law and positivist phases, never got beyond the sphere of exchange to the underlying economic essence of relations of production which were inherently exploitative.²¹⁷

To illustrate this problem further, Norrie uses another famous critic of the Enlightenment. Foucault²¹⁸ notes the contradiction between an ideal universalism and the reality of infinitely diverse human individuality. There is a distinction between punishment, which is an overarching theory, and the disciplines, of which prison is an example.

free subjects can read and understand the law and moderate their behaviour accordingly. But operating behind the façade of the juridical form, there lurks the real power base of social control in disciplinary techniques which freeze and fix a population in the postures of law-abidingness. Punishment – enlightened and liberal,

²¹⁶ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Butterworths 2001) p.29.

²¹⁷ Alan Norrie, *'Law, Ideology and Punishment, Retrieval and Critique of the Liberal Ideal of Criminal Justice'* (Kluwer Academic Publishers, 1991) p.8.

²¹⁸ Michael Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books 1977).

but really no more than a sham in practice, is counterposed to the all pervasive 'disciplines'.²¹⁹

How can this problem be applied to forgiveness and mercy? As explained earlier in this section, if the abstract legal subject is only treated in criminal law as reasonable, autonomous, and as a contractual party, then any emotional response to him would be excluded. This would include any expression of forgiveness on the part of the victim. The victim is entirely excluded from the process.

It also excludes the possibility and effect of community in the treatment of criminal offenders. The criminal subject is seen only as an individual, rather than as an interdependent subject.

Systems of punishment can respond to both objections, since they acknowledge the role of the victim, as well as, the role of the wider community in criminal sentencing. The work of the restorative justice movement for example, tries to do both of these things. In Chapter 5, I will explore this movement in greater detail and ask whether it answers to any degree, Norrie's concerns about Kantian proportionality and desert in punishment. My conclusion will be that it does not.

We have already encountered how the strict notion that bad moral choices will affect a person's freedom. In the perfect state, offenders only get the punishment they deserve, according to the social contract. Forgiveness and mercy are entirely unnecessary in this ideal, since proper punishment has already been calculated. This benefit and burden analysis of criminal law, described in Chapter 3, is similar to a contractual relationship. If criminal law theory is indeed still modelled on the contractual relationship, as Norrie maintains, then it would preclude forgiveness.

As we have seen, calls to involve victims in the sentencing process are gaining in popularity. If victims' wishes to express forgiveness in certain circumstances were not automatically excluded on the grounds of proportionality and fairness, or on the grounds of sentimentality, then a change might be possible.

²¹⁹ Alan Norrie, *Law, Ideology and Punishment, Retrieval and Critique of the Liberal Ideal of Criminal Justice* (Kluwer Academic Publishers, 1991) p.6.

What does Norrie propose in answer to the inherent contradictions that a Kantian system of law encourages? If retributivist philosophies of punishment fail to respect the offender in his true social context, what are the alternatives? If there are any, we must then consider whether they might justify forgiveness in the sentencing process.

The 'false separation' to which Norrie refers ensures proportionality and a fair result for both offender and victim. Those who commit crimes do so consciously and cannot expect to be forgiven, and to do so would not only undermine the authority of the State, but it would be insulting and condescending to the offender as an individual agent.

Victims feel dissatisfied by a trial process which appears to exclude them, and offenders who feel that their personal circumstances that may have led them to the point of offending, are ignored in the decision to convict and in the sentencing process. Current criminal law theory is not satisfactory and works on a false premise. Even though it purports to represent the wishes of a moral community in a moral state, the universal laws set out in Kant's categorical imperative are simply a simulacra of morality. We must ask more of this individual who has committed the crime, and, importantly, ask who he is, and how he can account for himself and others. This has enormous implications for forgiveness as a tool for resolution. If no personal circumstances can be taken into account, the law cannot exercise mercy and remain just. The judge must instead view the harm committed and the moral worth in a totally abstract way.

Norrie's position is not without its critics. Duff disagrees that there is a contradiction:

critical theorists portray such abstraction as problematic both because it is a source of individual injustice, when the law fails to attend to the concrete particularities of the individual offender and the social context from which the offence emerged, and because such individualized particularities constantly irrupt into the law, thus destroying its pretensions to rational coherence. But any system of criminal law...will need to abstract agents from their relevant features...if it is to avoid intruding improperly into the deeper, more personal aspects of citizens characters and lives.²²⁰

²²⁰ Anthony Duff, 'The Intrusion of Mercy', *Ohio State Journal of Criminal Law* (2007) Vol 4, p.461.

It could be argued that defendants might find such a lack of privacy a small price to pay in order to retain their singularity and individual dignity, despite being 'criminal' subjects.

Norrie considers whether Anthony Duff's new retributive theory²²¹ can provide a viable alternative to strict individualism. Duff's retributive idea is that there is a need for rehabilitation, and moral dialogue, or communication, which may lead to the restoration of moral relationships in the community. The moral community, therefore, has the goal of having a role in *educating* the individual about his role as a citizen. Society must communicate the wrong done in an effort to achieve that education. This suggests that the offender is asked to be answerable, rather than culpable. This is a communitarian vision of punishment.

For Duff, in order to be punished, the offender must be part of a genuine moral community, which, he argues, most wrongdoers do, as they would not want crimes to be committed in the same way against them. This theory would answer the charge that Kantian retributivism does not situate the offender in the community. The problem is that it does not account for the offender's personal circumstances. In terms of forgiveness and mercy, it still excludes the possibility of emotion, or any role for the victim, as it is still the State that communicates the wrong to the offender. However, it is possible that the emphasis on restoration, and the notion of answerability, may provide us with the possibility of restoration and reconciliation, if it is the victim who holds the defendant answerable. However, for Norrie, this argument is simply a restatement of the Kantian view:

the question remains whether this modified retributivism can avoid the problems of the ideal and the actual at the heart of the classical tradition or just relocate them.....evaluating how thieves perceive their activities in the actual world would probably lead to variable contextually determined conclusions.²²²

²²¹ See generally, Anthony Duff, *Punishment, Communication and Community* (Oxford University Press 2011).

²²² Alan Norrie, 'Simulacra of Morality' in A Duff (eds) *Philosophy and the Criminal Law: Principle and Critique* (Cambridge University Press 1998) p.111.

There are dangers in generalising the form of community which may seek to communicate or educate the offender:

any universal theory of modern community is inadequate, and this is true for both the maximalist communitarian approach and the minimalist liberal approach. If we are going to talk seriously about our experience of justice in modern society we have to start on the basis of overlapping moral communities that are fractured and conflictual.²²³

The answer is that we need a vision of individual responsibility which is not abstract, but located in the notion of a social community. For Norrie, the problem is not one of situating the offender in the community, or even, one of defining that community.

Retributive philosophies of punishment are an ideal representation of morality through the forms of the abstract individual that lies at the heart of concepts of subjective responsibility and community in law as retributive philosophy. This focuses on an ideal conception of the individual and excludes the broader social and moral context within which he lives. In addition to defining the kind of community we aspire to, we also need to establish a model of what it means to be a responsible agent within a community. At present, this is too abstract and leads to unfairness towards those who do not meet the objective criteria. Norrie does not describe what that model might be. To return this discussion to forgiveness and mercy, we might say that a system which allowed the offender to reintegrate into a community and make restoration, might be preferable to a Kantian world in which reason automatically precludes it. It is possible, then, that Duff's version of retributivism might allow it. However, it may not go far enough. The restorative justice movement allows forgiveness and communication between the victim and the offender, but may still remain retributive in its fundamental characteristics.

The main problem may be in Norrie's comment regarding the constituting of subjectivity. Duff's account still envisages individual subjecthood, albeit in a society which would communicate its moral outrage towards violent acts through punishment. What may be missing from this argument is that individual subjectivity, even with political and economic realities taken into consideration, does not allow for

²²³

Alan Norrie, 'Simulacra of Morality' in A Duff (eds) *Philosophy and the Criminal Law: Principle and Critique* (Cambridge University Press 1998) p.116.

communication *between* subjects. If we view the offender in society as an interdependent subject rather than an independent one, we can begin to see how a victim might wish to express forgiveness, even after violent criminal acts have been committed against him.

Having dismissed Duff's account of communicative punishment as simply another form of Kantian logic, Norrie proposes that alternatively, a *relational* approach can be taken to this problem of false separation. The reality is that what anybody does can only be fully grasped with reference to the personal and the social. To this end, he cites Bhaskar:

to grasp totality is to break with our ordinary notions of identity...it is to see things existentially constituted and permeated by their relations with others.²²⁴

This is where Norrie briefly touches on the notion of our relationship with alterity. This will be an interesting stepping stone for my attempt to locate forgiveness in criminal law. However, he sees this in a different way. For Norrie, the relational approach is to 'relate' two previously unrelated things – the universal subject with his political reality. From this, Norrie's 'entity relationism' emerges:

underpinning my psychological critique of the individual subject as a relational being is a philosophical conception of the internal relatedness of social and individual phenomena such that we can talk of entity relationism as an alternative to our ordinary notions of identity.²²⁵

Norrie touches here on the notion that as a subject, one is *interdependent*. However, he does not take this much further. The entity relationism he discusses appears to refer to the relationship between our political and social identity and our identity as a free, autonomous subject. This could be viewed in another way. In the quote from Bhaskar above, he argues that our identity is constituted as a subject through our relations with others. It is this interdependent subjectivity which might allow us to use mercy in our judgments and in the relationship between a victim and an offender. By acknowledging that victims do desire communication with offenders in order to understand, and sometimes in order to empathise, we are also acknowledging the

²²⁴ Alan Norrie, *Punishment, Responsibility and Justice: a Relational Critique* (Oxford University Press 2000) p.6.

²²⁵ Alan Norrie, *Punishment, Responsibility and Justice: a Relational Critique* (Oxford University Press 2000) p.7.

value of interconnectedness.

This idea has permeated other legal processes, such as the Truth and Reconciliation Commission in post apartheid South Africa, and is used to some degree in restorative justice processes. It is also implicit in some legal judgments involving the use of compassion.

In conclusion, Norrie's argument of the existence of a 'simulacra of morality' confirms my assertion in the beginning of this chapter that Kantian individualism dominates the criminal law. The false idea of the individual which Norrie identifies in his critique of Kantian responsibility creates a situation in which forgiveness is excluded. An alternative lens will be discussed which sidesteps this problem. We cannot locate mercy properly as the system currently stands.

4.2 A Response to Jeffrie Murphy

We saw earlier that Jeffrie Murphy is a staunch defender of Kantian justice, seeing real value in the emotion of vindictiveness, but none in forgiveness. This is an impoverished view of the value and prominence of forgiveness. This view insists, as we have seen in earlier chapters, that forgiveness, as an emotion is too soft and that those who extend it too freely lack respect for themselves as reasonable autonomous beings in the Kantian sense. The emotion of anger, on the other hand, is valuable, according to Murphy. Apart from the inconsistency in this argument that one type of emotion is acceptable, but not the other, Murphy's insistence on the value of vindictiveness can be challenged on a number of grounds. Firstly, it seems to leave no room for the victim who actually wants to forgive. Secondly, it comes across as rather selfish. As Ammar states:

if one carefully examines the moral deliberations of the victim from within the context of rational moral decision-making, which Murphy advocates, one finds the victim morally obligated to enter a narcissistic vacuum. In this vacuum all particularities are excluded leaving only the individual and the rational moral law.²²⁶

²²⁶

Douglas B. Ammar, 'Forgiveness and the Law - A Redemptive Opportunity', 27 *Fordham Urb. L.J.* (1999). p.1583.

Furthermore, it ignores that we are in relationships with others:

as is the case in the Kantian schema, where one abstracts from the particularities of a situation in order to apprehend rationally the formal principle of right conduct, the victim's primary response to the criminal is formulated from within a vacuum where only the universal moral law is present. All particularities are discounted, regardless of whether the offender is a fourteen-year-old child, the old man across the street, a lover from years past, or anyone else. In this scenario, morally speaking, you and I never relate to each other directly.²²⁷

This is an echo of the arguments given by Alan Norrie, which we explained in Chapter 3.

A further criticism of Murphy is that he accords the victim no further status other than that of a victim - with no possibility of moving beyond this status. Part of the value of forgiveness is that it accords the victim more control in the letting go of anger. It properly pulls back the power of the State and re-allocates it between the victim and the offender within the context of the larger community, offering the chance for healing.

Hampton, who defends forgiveness, suggests²²⁸ that some may forgive without risking their self-respect in order to refrain from degrading the offender and further passing on the messages of disrespect. She urges victims to resist hatred and instead learn more about the wrongdoer as a person, while including that person in the realm of shared morality. Even for the wrongdoer who has not yet repented, forgiveness makes sense to Murphy as an act of generosity and an effort to transform the relationship between the victim and the offender. A loss of self-respect, she suggests, may instead be a loss of self-esteem.

An acceptance of reason as the driving factor in moral decision-making suggests that vindictiveness is justified on the basis of safeguarding one's self respect as an individual. Herbert Morris²²⁹ takes issue with Murphy's definition of forgiveness as a letting go of resentment for a moral reason. He states that it surely does not have to be

²²⁷ Douglas B. Ammar, 'Forgiveness and the Law - A Redemptive Opportunity', 27 *Fordham Urb. L.J.* (1999). p.1588.

²²⁸ Jeffrie G. Murphy and Jean Hampton 'Forgiveness and Mercy', Cambridge Studies in Philosophy and Law (Cambridge University Press 1988). p.49-53.

²²⁹ Herbert Morris, 'Murphy on Forgiveness in Exchange: Forgiveness, Mercy and the Retributive Emotions', *Criminal Justice Ethics* 7:2 (1988).

for a moral, or any other reason. Whereas Murphy wishes to avoid leaps into ‘special realms’²³⁰, Morris says:

I find myself drawn when reflecting upon forgiveness to the idea of transcendence of grace and I believe Murphy may have too quickly moved away from the mystery which lies at the heart of forgiveness.²³¹

Murphy holds that self-respect and self-respect for others demands that forgiveness is only possible where there is a moral reason for giving it. He disagrees with Murphy’s contention that offenders are intent on degrading us, but he does acknowledge that the idea of forgiveness is closely related to status (and therefore self respect). In contrast, Morris says forgiveness is in one’s heart²³². Is it not too difficult to identify what these moral grounds are? It may be a purely involuntary act. Is one particular reason necessary? What about attempts to forgive? In response to Murphy, Morris contends that:

if one remains sensitive to the wrong done and one is forgiving I am not persuaded that self respect or respect for others need be diminished by the heart’s capacity for generosity in the absence of moral reasons.²³³

In other words, one can retain one’s self respect and respect for others when the predominant explanation for forgiving is love. Furthermore, forgiveness involves more than the relinquishing of resentment, even when this is accompanied by one’s full comprehension of the wrong done to one and there are moral reasons for one’s efforts. The diminishing of resentment is not enough to constitute forgiveness – something else is required. This is an echo of Lindsay Farmer’s response to Duff’s contention that mercy was inappropriate in the Al-Megrahi case.

²³⁰ Jeffrie G. Murphy and Jean Hampton ‘*Forgiveness and Mercy*’, Cambridge Studies in Philosophy and Law (Cambridge University Press 1988). p.30.

²³¹ Herbert Morris, ‘Murphy on Forgiveness in Exchange: Forgiveness, Mercy and the Retributive Emotions’, *Criminal Justice Ethics* 7:2 (1988). p.16.

²³² Herbert Morris, ‘Murphy on Forgiveness in Exchange: Forgiveness, Mercy and the Retributive Emotions’, *Criminal Justice Ethics* 7:2 (1988). p.17.

²³³ Herbert Morris, ‘Murphy on Forgiveness in Exchange: Forgiveness, Mercy and the Retributive Emotions’, *Criminal Justice Ethics* 7:2 (1988). p.18.

Murphy's self-respect theory can be challenged on the grounds that it is too narcissistic, as Morris suggests. Furthermore, it is based, following Norrie, on an understanding of the individual only as an abstract subject. This notion of the abstract subject, and its recourse to reason will be challenged in the next section. Murphy's view of the importance of anger is, in my view, an impoverished one. Victims need not feel degraded by forgiveness, or lose self-respect. We will return to this argument in Chapters 7.

4.3 A challenge to the importance of Kantian reason: Linda Ross Meyer

In her book, *The Justice of Mercy*, Linda Ross Meyer suggests that mercy and forgiveness are only excluded from the criminal justice system, if we accept that reason is the basis for morality. She suggests that mercy is the antithesis of law only if we accept a Kantian view of politics and law is acceptable:

to defend reason requires an argument about why reason pace Kant is not the ground of responsibility ethics and community – reason cannot be such a ground because reason itself requires a prior stance of being with others.... Instead of reason being the antithesis of or exception to the law, mercy takes over as the ground on which justice itself is possible.....switching our philosophical lens shows a very different account of the relationship between justice and grace and derivatively between punishment and mercy.²³⁴

If we follow the argument that the only duty-bound morality can derive from reason, then mercy and forgiveness are not possible. If, on the other hand, we look at morality in a different way, the irrationality argument disappears. In other words, mercy cannot be allowed because it does not treat similar cases alike, it gives (in the form of a merciful judgment) to one offender what it cannot give to another due to personal circumstances. Mercy, then, is arbitrary and irrational and unjust, according to this analysis. A further objection to mercy is that it is condescending (a point Murphy also makes) as it treats us not as free responsible agents but as victims of circumstance. Finally, it is undemocratic in that it undermines the majority's will as expressed in the criminal law.

²³⁴ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.3.

Regarding forgiveness from the side of the victim, it is necessarily an emotional response, not a reasoned one. It, therefore, belongs to the private realm only. However, if a different 'lens' is used, the arguments against mercy and forgiveness no longer hold true, because reason does not take primary position.

In Meyer's view, this shift is an essential one and requires risks to be taken, outside the realm of reason:

we cannot rely on justice to arbitrate our relationships, we have to take risks. It is mercy and forgiveness that lets us get on with living and recognises that we cannot be litigating *Jarndyce v Jarndyce* forever. To live is to forgive and to risk and be uncertain and to outstrip language and reason itself.²³⁵

Forgiveness means to risk a continuing relationship. In this way, forgiveness is public. Here, Meyer means that we cannot rely on Kantian justice, our 'kanticism' to arbitrate our relationships. Other theories may allow us to exist outside the realm of reason and therefore forgive, if we wish to do so. Relying on reason as the basis for law, is an unrealistic one, according to Meyer. This is because it is impossible to achieve a true reasonable judgment. This risk is one that is taken by the African philosophy of 'uBuntu' and does require a leap of faith. It is a question worth asking. Along with Farmer, Meyer is willing to make the leap, and to question current legal discourse.

Those who want to receive forgiveness, or to bestow it, must take a risk. This is true of the private victim who wishes to forgive, but also of the judge who might wish to exercise a merciful judgment. Private trust takes place when a victim chooses to forgive one who has harmed her, one who has an unfair advantage over her. Forgiveness in these circumstances takes place despite this unfair advantage, despite the resentment one may feel even after punishment. It certainly does not preclude the possibility of punishment.

Public trust too may be involved in forgiveness, in the form of state pardon or merciful judgment. If reason is no longer the justification for morality and if individual free will is no longer the basis for the same, then all the objections to such mechanisms fail and we can pardon on the basis of grace.

²³⁵ Linda Ross Meyer, 'Forgiveness and Public Trust' (*Fordham Urban Law Journal*) <http://ssrn.com/abstract=235477>.> accessed 16 August 2014.

The new lens, which Meyer suggests, takes a different path to that suggested by Norrie. Whereas Norrie concentrates on law's failure to account for the true nature of the criminal subject by ignoring his political and economic reality, Meyer suggests that we understand the subject from the start in a situation where he is 'with others'. This, she says, has important implications for the study of mercy and forgiveness. Once we stop taking reason as the grounds for all systems and all moral conduct, we can see the place of victims in the criminal trial entirely differently. This also enables us to envisage a place for forgiveness and mercy, for we are not bound by what is rational, but by our place alongside others. The philosophy of individualism, of the social contract and reason automatically separates us from the offender. As a result, both the offender and the victim are isolated in the process. A concept of the world and systems of justice as 'being with' allows us to be open to the possibility of justice alongside forgiveness.

Meyer bases this analysis on the philosophy of Heidegger and Levinas. This will be explored below in the context of the problematic of mercy. In the next section, I will analyse her argument in more detail.

If reason is not the only basis of morality in society, it may be that mercy and forgiveness can be possible on the grounds of interconnectedness: our mutual connection with each other and the world as fully aware, engaged beings²³⁶. This is an extension of the Heideggerian concept of Dasein²³⁷.

Briefly, Heidegger's theorization of existence argues that it is wrong, as Kant, Descartes and other Enlightenment philosophers argue, to separate the idea of the subject (the reasoned individual, it may be supposed) from the object (the world in which we live). Instead, the idea of Dasein sees that we are being-with – in the world already. My identity is bound up in the world in which I exist.

²³⁶ Heidegger refers to the term as MitDasein.

²³⁷ Meaning life or existence.

This argument is given further credence as Meyer draws on the thinking of Levinas in '*Existence and its Existents*'.

reaching the other is on the ontological level the event of the most radical break up of the very category of ego, for it is for me to be somewhere else than myself, is to be pardoned, not to be a definite existence.²³⁸

How can this translate to real justice in real courts? Compassion can be described as an overwhelming need to act against the established law and arises because of an inexplicable bond between the parties – a judge is 'moved' to be merciful, or the jury refuses to apply the law strictly. Was this not the original function of equity? This idea was presented in Chapter 2. We will examine the ways in which the criminal courts exercise a kind of equity in Chapter 6.

A way of looking at mercy within the substantive criminal law is to recognise that because of the structure of criminal law, people are made responsible for consequences that just happen rather than those which are strictly bad (omissions and causation). Lack of knowledge is one good example, or negligence. On the other hand, the idea of being with would not focus too much on *mens rea* but would concentrate instead on relationships. For instance, there is no mitigation or responsibility on the part of the victim in provocation (now loss of control):

a being with account of wrong can explain our tendency to mitigate in these cases precisely because it can acknowledge the victim's provocation as relevant to the nature of the wrong....acknowledging that wrong is immersed in relationships may also explain the importance of confrontation²³⁹

Case law accounts for difference, allows discretion but somehow law is considered to be immovable, inflexible. Meyer stresses that we need to look at how the law actually operates, and understand that a different theory may not be so immutable.

²³⁸ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.90.

²³⁹ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.74.

The different lens has a very particular application to punishment (and therefore forgiveness and mercy) once we challenge the Kantian view of the paramount importance of reason and of the position of the subject-citizen as an autonomous being with free will.

the Heidegger approach...holds extremely significant consequences for the problem of mercy in sentencing... if we do not need reason as the glue then granting (unreasonable and undeserved) mercy may not destroy the ground of community at all but may instead reflect and recognise the lopsided risk and vulnerability that is at the heart of community.²⁴⁰

What is needed is a sort of rethinking of the way in which we punish. In order to do this and move from a retributive understanding of punishment, we need 'expanded sentencing choices'.²⁴¹ Retribution requires that a sentence is painful, and makes prison time

the coin of the realm...desert gets cashed out in lost and empty years of isolation rather than efforts at reunion.²⁴²

The solution presented now in order to achieve some semblance of fairness is that of mandatory sentencing. Meyer says that these are too punitive, and merely serve to label offenders as being beyond settlement:

far from recognising the tragic and the sublime unknowable in offenders, mandatory sentencing as we practice it degrades and denigrates them...²⁴³

Forgiveness and mercy are not appropriate in this ideal, since the offender is already getting the punishment he deserves, imposed by society through duty, through the categorical imperative to punish. This categorical imperative cannot be altered or diminished by a forgiving victim or a merciful judge.

However, viewed through the idea of the existence as 'being-with-others' Meyer argues that punishment should not be about the 'universalising of a maxim' ²⁴⁴but a

²⁴⁰ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.26.

²⁴¹ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.98.

²⁴² Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.98.

²⁴³ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.94.

²⁴⁴ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.4.

failure to live up to our nature as-with-others, this includes our connection to others in the same 'being-in' or 'being-with'. It is conceived as the:

'pain of a shared remembering of one's self-alienation from the connection and responsibility for other'²⁴⁵.

The pain of this experience seeks resolution in a *settlement or sacrifice* that will rekindle trust and ethical community for the future:

it can instead be understood as an instance of the recognition and reunion of the basic grace of the interrelationship from which we start and a humble tender of the gift of future possibility of being-with.. in short merciful sentencing is no longer contrary to human nature but in accord with it.²⁴⁶

Instead of punishment being purely retributive, it should be considered to be the shared memory of the wrong as wrong. The operation of mercy would give the future some meaning. It is an end to the narrative of wrong, shaping the story and giving it sense, a sentence.

punishment culminates in an unsecured undeserved settlement or compromise that takes an unguaranteed risk of being with and proffers trust for a future rather than settling accounts with the past.²⁴⁷

This analysis denies desert, and suggests that mercy and forgiveness are part of being human. It also sounds very close to an earlier, historical account of mercy, as we saw in Chapter 2. It would also account for a victim's involvement in a criminal trial, to express forgiveness if that is what is desired. This may not be pure conjecture – the restorative justice movement suggests that punishment should move from a pure desert model to one in which settlement and mediation might be suited to criminal law problems. This is explored later with a view to analysing whether restorative justice works as a model of forgiveness in practice.

If punishment is the shared memory of a wrong, mercy acts as an end to the cycle of vengeance. After wrongdoing, victim and offender are thrown into a situation they do not know how to handle. The experience for both offender and offended against is

²⁴⁵ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.27.

²⁴⁶ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.27.

²⁴⁷ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.27.

described as follows:

trauma involves repetitive, obsessive dreams that prevent one from returning to a stable understanding of the world. (in a trial.....)The world has become chaotic and one is forced to re-experience what one cannot assimilate, what does not make sense. The victim and offender are cut off from each other, each locked in a separate kind of trauma that cannot be brought to language and therefore cannot be shared....primal mercy or grace comes to appearance in punishment then in its more familiar guise as compassion - an awareness, an experience and articulation of our mutual reliance and vulnerability.. mercy cuts off the infinite rebite of remorse and the infinite causal chain of responsibility or vengeance that would otherwise be ours.²⁴⁸

The idea is that if the defendant experiences the *wrong as wrong*, then he will be moved to remorse. The sentence is then the settling of a crime - only the acceptance of community can bring the defendant back from self-exile.

In this way a determinate sentence is merely settlement and has nothing to do with desert. Punishment in that context is the shared memory of a wrong. The memory for the victim would be the fear or trauma caused by the event, the memory for the offender being the remorse felt. If a confession or testimony takes place, there can be a reunion, which is finally settled in a sentence. In short, we need to imagine that punishment and remorse is the shared pain of wrong as wrong. The pain of the victim's fear and despair and the offender's remorse calls for testimony and confession before a compassionate and merciful witness. Merciful settlement comes out of this encounter. It is better that we do not expect remorse, not because we do not believe in it (as Murphy would have it) but out of respect for the sublimity of the offender. This is the idea that we cannot presume to know everything about the offender. Instead of requiring remorse, Meyer suggests an alternative sentencing system which removes the uncertainty and the risk of a lower sentence being dependent on remorse, avoiding therefore

the sense of indignity some defendants experience when they feel they must grovel for favour before an authority figure who may not be a compassionate judge.²⁴⁹

The reunion of which Meyer speaks is in the form of compassion, both from the sentencing judge and the forgiving victim. We should not assume that an offender is

²⁴⁸ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.78.

²⁴⁹ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.93.

less human than the one he has harmed.

In practical terms, the idea of settlement between the offender and the victim is an interesting one for our discussion on forgiveness and mercy. Restorative justice is based on this idea, and historically, we have moved from a position in which criminal law was not a function of the state, but a dispute to be sorted out between individuals. The role of the victim has been sidelined, but we have seen that victims' rights are being given a much greater role in the criminal justice process. Theoretically at least, the idea of settlement may not be out of reach. In practical terms, this could be done in the form of an impact statement from the defendant, not just the victim. Meyer points out that plea bargaining, not as common in the UK, is in wide use in the USA. This could be seen as an approach which is closer to the principles of civil law.

I would like to focus on one interesting example brought to our attention by Meyer – that of military trials. These have a discretionary sentencing system. She suggests that this is an example of the institutionalising of mercy. An element of risk and trust is involved. Mercy flourishes in the context of responsibility for others, and the mercy giver is willing to take risks based on the strength of the relationship with the defendant. This is further supported by the emphasis in military trials on character evidence. In reference to some appalling crimes committed by military personnel on duty, she argues:

the forgiveness we may offer in these cases is the settlement made with a community that cannot ignore the fact that these crimes were committed by citizens of honour when the community itself trained to be obdurately indifferent so that they could kill.²⁵⁰

The tendency in a military context is to see the offender as a human tragedy rather than an inhuman monster. It is better that the judge or the witness is able to see both the truth of the victim's suffering and the truth of the offender's humanity.

Norrie's argument is that traditional retributive justice sees the offender as an abstract construct. This excludes forgiveness as we cannot take into account the offender's personal circumstances, or any other factors, which might create the conditions for

²⁵⁰ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.159.

mercy. It relegates the judge to an independent arbiter of proceedings and gives the victim of crime little say. Most importantly, the character of the defendant is disregarded for sentencing purposes with the judgment based on the harm done.

Meyer's argument for settlement and his analogy with the military process may provide a setting in which mercy can operate, as it is not constrained by the requirements of a retributive model based on reason and autonomy. Alongside Meyer, I will show that an alternative philosophy of punishment is preferable, particularly one that emphasises belonging, and one which does not exclude the defendant from the community.

4.4 Relational thinking

The idea of settlement is not Meyer's alone. To provide further support for Meyer's idea of 'being with', Sylvia Clute considers the principle of one-ness²⁵¹. Before reason, interconnectedness is a given, and we approach criminal punishment from the perspective of the offender, the victim and society. This is part of a framework of holistic thinking, which does not prevent punishment from taking place, but where the goal of the process is the healing of a rift. Clute refers to this as 'unitive' rather than 'punitive' justice:

the defining characteristic of unitive justice is its inclusiveness. Its goals are healing, restoration, and reconciliation, not alienation. It is grounded in the principle of doing to others what we would have others do to us, a moral compass found to some extent in every major religion or culture.²⁵²

This sounds like justice made in community. In Chapter 7, I will explore the concept of justice and reconciliation in uBuntu.

In an article that emphasises the reality of human emotions in sentencing decisions, Sam Pillsbury argues²⁵³ that in moral decision making (and it is inescapable that criminal punishment is a form of moral decision making), feelings are more significant than the system would care to admit. If forgiveness is a letting go of

²⁵¹ Sarat A, *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* (Cambridge University Press 2012) p.243.

²⁵² Sarat A, *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* (Cambridge University Press 2012) p.243.

²⁵³ Samuel H Pillsbury, Review Essay: Learning From Forgiveness. (*Criminal Ethics*, John J. Kleinig, ed. 2009).

resentment, then that resentment is transformed to another feeling or emotion. Through personal interaction, truth may be achieved in a more lasting and significant way. The victim's moral view may change following a narrative. Also, an individual's character should not be judged on a single act and character/value should not be exclusively defined by one wrong.

Explaining types of responsibility, he holds the view that the State cannot be responsible for factors which shape a person's predisposition to crime. On the other hand, causes of crime such as economic and race discrimination must be considered. Within individual responsibility comes relational and legal responsibility (forgiveness being a type of relational responsibility, punishment being a form of legal responsibility). In family life, for example, legal (strict) responsibility could be imposed but often is not; rather, a personal interactive and relationally focused approach is used in which feelings would be discussed:

in relational responsibility decision making is interactive....it can matter a great deal whether the wrongdoer accepts responsibility and expresses remorse. It matters how much she or he is committed to relational repair.²⁵⁴

In this sense, remorse is not a quid pro quo, but one side of a reconciliation, of a settlement. Seen in this way, forgiveness is a tool to enable us to critique forms of legal responsibility including punishment. The victim is in a position of power here to decide whether to grant forgiveness. This is a recognition of the possibility of change, as future relationships are not determined by the past wrongs of the offender.

Forgiveness is possible because the wrongdoer's evident imperfection is rooted in the human condition. All people are capable of wrongdoing and all are in need of forgiveness – even Kant pointed this out. The need to forgive and be forgiven is integral to the human condition, which is imperfect. By contrast legal responsibility is impersonal and decided according to legal universal norms. According to this model, the personal views of a judge should not be taken into consideration. Likewise the attributes of a defendant should not be relevant to any decision taken. However, Pillsbury states that the reality is often very different as the real practice of law is in

²⁵⁴ Samuel H Pillsbury, Review Essay: Learning from Forgiveness. (*Criminal Ethics*, John J. Kleinig, ed. 2009). p.18.

fact highly emotional particularly in the criminal courts. In particular no account is taken of future relations, only the past ones:

the trend has been to minimise judicial and parole discretion in favour of determinate sentencing that impose punishments according to strict legal criteria, primarily the offence of conviction and past convictions.²⁵⁵

If, in the doctrine of relational responsibility, we recognise that human imperfection characterises both victim and offender, and we recognise that emotions are equally as important as universal principles in a court of law, then we must allow for the possibility of the wrongdoer's transformation. Mandatory life sentences reject all these possibilities. Most sentencing guidelines are justified on the basis of legal responsibility. Judgments are to be dispassionate and universal and should aim at ending social relations once the person has been convicted. From this moment on, the offender is 'other' and is treated as separate from other human beings.

There is a clear influence of hatred in these severe forms of punishment, which cannot be moral if it is born of the hatred for the person punished. In these decisions, there is a denial of transformative possibility. Forgiveness would allow for a fundamental relational change as the forgiver might decide that past wrongdoing need not to permanently shape the relationships between victim and wrongdoer. Excessive prison sentences merely serve to reinforce the conflict. Forgiveness allows for the possibility of change and warns of the dangers of making final judgments on another's character.

A mandatory life sentence takes a perfectionist view of the law and of the sentencing judge, allowing no space for human complexity. In short, forgiveness allows a permanent change in relations.

The reason that forgiveness allows the possibility for change while punishment does not, is that with traditional retributive punishment we are making moral comments on the evil character of the offender and his act. Forgiveness allows us to move on from this position.

Treating the offender in this way actually contradicts the basis of retribution. If a

²⁵⁵ Samuel H Pillsbury, Review Essay: Learning from Forgiveness. (*Criminal Ethics*, John J. Kleinig, ed. 2009). p.22.

criminal is treated as an outsider, as someone who is not worthy of inclusion into the community, we are not respecting him as a Kantian autonomous individual. A more restorative approach would allow the defendant to become reconciled with the community. This idea will be explored fully in Chapter 7.

In a book entitled *Forgiveness and Retribution - Responding to Wrongdoing*, Margaret Holmgren²⁵⁶ suggests that we replace the system of retributive punishment with a 'paradigm of forgiveness'. She tackles features of the system of desert, and asserts, like Meyer that we can approach punishment through a different lens. This involves a different response to wrongdoing and urges the reader not to take desert for granted. The first reason for this is that we must separate the crime from the criminal: in other words, punishing a person for who he is, in a moral sense, as well as what he has done. Secondly, she justifies this paradigm of forgiveness with a contention that it is crucial to see the 'morally salient' nature of the offender as having true worth, separate from his act.

In contrast to Holmgren, Clute and Meyer, I will not suggest an overarching paradigm, but a way of identifying forgiveness as it occurs in the system already and a suggestion that it should not be excluded. Forgiveness can inform criminal sentencing since it suggests that the individual offender should be considered, not just formal descriptions of present and past offences. The possibility of transformation should be considered. Change can occur even after serious wrongdoing:

what forgiveness teaches is not that serious offenders should be forgiven but that we should not trust a legal process which presumes or mandates permanent exclusion from civil society without giving offenders a meaningful opportunity to present themselves as unique human beings capable of good as well as evil.... Forgiveness as a form of relational responsibility reveals truths that criminal law should respect.²⁵⁷

These theorists all show that alternative paradigms of punishment are possible. It seems that the restorative justice paradigm may seem to be a suitable way in which to achieve this. I will explain in the next chapter however, that this has severe limitations and therefore, implications for a consideration of forgiveness. If that is the case, then we must find a way to use these paradigms in a plausible way. I will suggest that the

²⁵⁶ Margaret Holmgren, *Forgiveness and Retribution: Responding to Wrongdoing* (Cambridge 2012).

²⁵⁷ Samuel H Pillsbury, Review Essay: Learning from Forgiveness. (*Criminal Ethics*, John J. Kleinig, ed. 2009) p.35.

compassionate emotions are in use, both in defences and merciful sentencing and that victims do wish, sometimes, to reconcile with offenders, if the system would allow it.

4.5 Setting out an argument for intersubjective mercy

In this chapter I have shown that the Kantian criminal law, based as it is entirely on reason and individual responsibility, has been considered to be the only possible one.

The principal criticisms of the Kantian system of criminal justice, outlined above, appear to be two-fold. Firstly, Norrie sees no recognition on its part of the true citizen, who cannot help but be influenced by the political, economical and social environment in which he lives. Instead, Kantian-influenced systems of law and punishment have a myopic view of that individual, who is abstract, and imbued with no special characteristics other than his agreement to accept punishment on transgression by virtue of being a citizen.²⁵⁸ This leads to what he describes as the 'simulacra of morality'²⁵⁹, and ultimately to a criminal justice system that is riddled with inconsistencies since judges are human, and pass judgments with elements of mercy in them.

Secondly, according to Meyer, the Kantian view excludes any notion of 'being-with-others'. Meyer would prefer a system influenced by Levinas. She uses military trials as a context to this as an example of a system in which at least the 'deep character' of the defendant is taken into account when deciding upon guilt. In addition, she advocates impact statements in sentencing, to include not only the effect of the crime on the victim, but also on the defendant, thereby including any remorse, or discussions of forgiveness between the parties.

The notion of being-with-others can be taken a step further in the context of critically addressing the theoretical basis of criminal punishment and the way in which we conduct trials. More than being-with, or acknowledging the whole individual, I propose that we consider instead a philosophy of interconnectedness. As a consequence, the notion of individuality and the subject - central to blameworthiness,

²⁵⁸ Alan Norrie, 'Criminal Law' in *The Critical Lawyers Handbook*, Vol 1, (eds) Ian Grigg-Spall and Paddy Ireland (Pluto Press 1992). p.77.

²⁵⁹ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press 2000). p 4.

and therefore in our approach to punishment - is in need of reassessment.

In the context of mercy and forgiveness, I have demonstrated, through the work of Alan Norrie, that this view of criminal law is fundamentally flawed. As a result it cannot allow for the emotions. Forgiveness would be an example of this. The subject which Kantian law creates is an individual, an abstract 'simulacra of morality', a false construct, which fails to account of the political and economic realities he lives in. This is Norrie's central argument. Norrie proposes the notion of 'entity relationism', where the real subject and the abstract subject would be brought closer together. I have argued that although Norrie touches on an argument for interdependence, this is not sufficiently developed. Through this entity relationism, he seeks to explain how Kantian individualism excludes a notion of the individual as being located between the personal and the social. In fact, there may be a case for building a theory or paradigm for forgiveness in the criminal process by perceiving the subject as an interdependent entity. This subject is dependent on the society he lives in, and society, in its turn, is dependent on him.

In the forthcoming chapters, I will explore three ways of reading this subject and that can inform our view of forgiveness in restorative justice, sentencing and judicial decisions, as well as, in systems it has been successfully incorporated, namely the TRC. The African philosophy of uBuntu allows the subject to be seen in this way. In doing so, I will build a paradigm for the use of forgiveness statements in the form of victim impact in criminal trials and sentencing.

I have identified some of the key objections to mercy in a Kantian system of criminal law and punishment. Forgiveness is seen as unreasonable since it does not allow for similar cases to be handled in a similar manner. It has been argued that it is better, except in the most unusual circumstances for universal principles of justice to be applied throughout even if this would be unfair to some individuals. We saw that Alan Norrie and others challenge this arguing that individuals who commit crimes are not abstract legal individuals, but political, ethical and social individuals that may have all sorts of backgrounds and influences that the law does not take into account of. Norrie argues that far from being a rational law, in fact the criminal law is full of inconsistencies, and the failure to consider the political and social circumstances that

shape an offender's propensity to commit crime exacerbates those contradictions and illogicalities. Law asserts that mercy cannot be tolerated on the grounds of inconsistency, and claims that unfairness to one offender to the advantage of another would be one example of its irrationality. Kant is clear that mercy has no place in the perfect system of punishment.

Another way of considering this would be to say that instead of dismissing the law altogether as being irrational, bereft of reason, we can consider an alternative theoretical basis for criminal liability and punishment, one which would allow for the possibility of mercy, traditionally dismissed as evidence of irrationality in judicial decision making, and dangerous to the rule of law and its due process. This theory would concentrate on the criminal not as lacking in political subjectivity but as the subject of an ethical encounter. In this way, mercy becomes necessary, not irrational. So, instead of asking why socio – political notions are not included in our invention of the criminal subject, we might ask whether despite those characteristics there is a responsibility or call to the other (in this case, the individual accused of crime). This ethical encounter would require forgiveness. According to Emmanuel Levinas, the ethical precedes the political. Holding that there is an ethics before law, before politics, which requires us to be 'for' each other, his philosophy can be useful for the question of whether there is a place for forgiveness in the face of criminal wrongdoing.

Of course, integrating the ethics of forgiveness into process such as courts and pre-trial sentencing tools or prosecutorial decisions does not strictly reflect Levinas' first philosophy. Such considerations belong firmly in the realm of the political, not the ethical.

Along these lines, Meyer's vision of Levinas justifying mercy is a start. However, what is also necessary is a more detailed discussion of what the political entails for Levinas, and whether this could encompass notions of mercy. At first glance, forgiveness seems to belong firmly to the realm of the ethical, whereas law, politics and justice are part of the political. The concept of justification should be examined more closely here. Of course justice and mercy are traditionally opposed; mercy is a threat to justice on the basis of consistency and proportionality – this is what a strict

Kantian perception of criminal justice would argue. It may be, however on further scrutiny of Levinas' work that he was certainly interested in time, forgiveness, and rebirth and that the distinction between politics and ethics is not dramatically clear-cut.

This will not be an easy shift. For Meyer:

that we have refused for thirty years to adjust criminal law in accord with kanticism in these areas suggests our intentions are deeply against these reforms. It seems that what we do may be more consonant with a view of ourselves being with and with an extensive responsibility for others not entirely limited by principles of culpability and *mens rea*.²⁶⁰

In the next chapter, I will draw on these criticisms and examine whether forgiveness is located in criminal law and punishment, focusing on the restorative justice movement, the natural home for forgiveness.

²⁶⁰ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.75.

5. LOCATING MERCY IN RESTORATIVE JUSTICE

restorative justice stands in need of some explosive force powerful enough to demolish our moral intuition that justice demands the infliction of a painful comeuppance upon the wrongdoer. It needs something big enough to snap offenders out of the propensity to offend; strong enough to quell victim's desire for revenge, and to inspire genuine forgiveness; and deep enough to restore the moral bonds of community. And, since *amor vincit omnia*, how about love? Restorative justice sees universal love as the primary fuel for accomplishing all of these feats. It aspires to harmonise the virtues, values, and practices of love and justice.²⁶¹

Despite the insistence of UK criminal law on the retributive legal system, which emphasizes reason, fairness and proportionality above all else, there is growing interest in the value of 'restorative' justice processes. As we saw in Chapter 2, the emergence of State-centred justice is reasonably recent in legal history. The retributivist system of desert had relegated the role of the victim to the margins of the system, as an observer at most. By contrast, restorative justice favours an approach to crime which gives the victim a much greater role in the process, emphasising dialogue between victim and offender. An apology and an agreement for reparation and reconciliation may be included, followed by forgiveness if the victim wishes. The idea is that both offender and victim will benefit (the former because of reintegration to the community, the latter because of the opportunity to participate in the process rather than being excluded from it).

We have seen that a Kantian approach to criminal justice cannot include mercy and forgiveness. This is due to the irrationality of mercy, in that like cases cannot be treated alike. The exclusion of mercy is based on an abstract conception of the criminal subject, whose personal circumstances (which might, in other circumstances have inspired mercy and forgiveness) cannot be taken into account by a sentencing judge. Finally, the victim, in this understanding of justice, has no 'voice' in the process as the punishment of the offender has become a matter for the State.

We described in Chapter 2 how this was not always the case, and that punishments for criminal acts have evolved from a person-to-person encounter to a State-controlled system. Whilst this evolution of the Enlightenment, in theory, has guaranteed more

²⁶¹ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice*, (University Of British Columbia Press 2004) p.27.

civilized punishment practices, it has ensured that the role of the victim in criminal law has diminished. This has resulted in a system in which victims feel dissatisfied and disempowered. This appears to be changing. I will argue that the contradictions referred to in Norrie's work and described in Chapter 4, are still present, and that the tensions in restorative and retributive justice need to be better articulated. It is through this better articulation that we will find a place for mercy and forgiveness.

Restorative justice is now a fundamental part of sentencing in certain cases, and the movement is increasingly recognised as a valuable way to deal with offenders, particularly, with those involved in youth and property crime. The question that arises is whether these new initiatives help to ease the experience of victims in the process, as well as pave the way for a better understanding and acknowledgement of reconciliation, mercy and forgiveness. If, as we saw in Chapter 1, retributive justice is failing to stem re-offending, restorative practices may help with this²⁶². For our purposes, it may provide a setting in which forgiveness may take place. Because the victim is given a more central role, it may not be too much of a leap to ask whether restorative justice might leave room for a victim who wishes to forgive 'his' offender.

In this chapter, I will explain and explore the restorative justice process in the context of forgiveness and ask whether it proposes a new philosophy of criminal justice which might allow forgiveness, or whether it remains 'Kantian' despite its laudable aims. In particular the new role of victims must be assessed. I will argue that restorative justice fails to accommodate forgiveness and mercy in its present form, as the focus on victims fails to account for the victim who wishes to forgive. Furthermore, initiatives to improve the position of victims in the criminal justice system is confusing and contradictory, as lawmakers are not supposed to be influenced by their views. A brief explanation of restorative justice policy and practices in the UK will follow, with an assessment of the place of forgiveness within those processes.

²⁶² A study undertaken by the University of Sheffield for the Home Office found that recidivism and cost of punishment are both considerably reduced through the use of restorative justice: J Shapland, et al: 'Does Restorative Justice affect Reconviction', Ministry of Justice Research Series, (London: Ministry of Justice, 2008).

5.1 The restorative justice movement

The Restorative Justice Consortium defines restorative justice in the following way:

Restorative Justice works to resolve conflict and repair harm. It encourages those who have caused harm to acknowledge the impact of what they have done and gives them an opportunity to make reparation. It offers those who have suffered harm the opportunity to have their harm or loss acknowledged and amends made.²⁶³

The movement was born of a concern for the overly retributive and draconian nature of punishment in an adversarial system, which neither appears to help victims nor prevents recidivism. Whilst it cannot be confined to one source, the idea of restorative justice is often attributed to Howard Zehr, who presented it in his book *Changing Lenses* as an 'alternative justice paradigm'²⁶⁴. Zehr also identifies crimes as conflicts which are fundamentally between the parties: these conflicts have been 'stolen' by the state and should be returned to the parties involved. Its principles are framed in terms of obligations: a contractual notion, rather than in criminal law terms. Secondly, he emphasised the *emotional* needs of victims and offenders, thus, making the justice model one of communication between the parties. In this way, harmful emotions such as vengeance are prevented from taking priority. The question is whether other emotions, such as forgiveness, can be allowed to flourish. The argument is that if this communication is not allowed to take place, then the only outlet is a call for draconian punishment. This notion was recognised by the Truth and Reconciliation Commission (see later), with its emphasis on the role of narrative as the way to get at the truth, but also as the way for victims to heal. Ultimately, forgiveness and atonement may follow as the outcome of this encounter.

It will be useful to consider briefly some of the philosophical differences between the two systems. This will enable us to see whether restorative justice has room for an understanding of forgiveness and mercy in a way that retributive justice does not.

As we saw in Chapter 3, the fundamental idea behind a retributivist system of punishment is that a crime is a violation against the State. The advantages of this system are that the trial system can be seen as objective and proportionate without the

²⁶³ www.restorativejusticeconsortium.org.

²⁶⁴ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990)

emotions of the wronged person interfering with the rectitude of the decision. A restorative setting argues that whilst this may be true, this level of objectivity in fact ensures that, in practice, no one truly benefits. By making offenders responsible to a particular victim, there is an opportunity for amendment and repair according to the civil model of restitution. In a restorative setting however the harm done by a crime is an offence against the person or the community; victims are allowed the opportunity to participate; victims and others may be brought together with an impartial mediator to consider what happened and find out what can be done to put it right, while responsibility and reintegration are encouraged. In other words, the offence is committed against another individual, not a faceless State.

Furthermore, the process of communication allows room for an exchange of views and explanation, whereas in a traditional trial setting victims may often leave the process feeling frustrated and angry, in some cases sparking vindictiveness and vengeance. In a traditional trial, victims have very limited opportunity to say how they have been affected by an incident; the system keeps victims and offenders apart, others speak for them, and the offender is not encouraged to seek responsibility.

Restorative justice, on the other hand, claims it is necessary to deal more adequately with the emotional needs of the victim. The benefits for victims of crime are that they have an opportunity to explain the impact of the crime, there is an acknowledgement of the harm caused, a chance to ask questions, some control and choice, peace of mind about the future and sometimes an apology is agreed. It can also provide offenders with an opportunity to explain what happened, the opportunity to try to put right any harm done, to restore some self-esteem and achieve re-integration into the community.

In this way, the victim's and the offender's rights (and responsibilities) are both recognised. The idea is to acknowledge that both the victim and the offender may feel short-changed by the system. In the retributivist system, the victim feels ignored by the objective process of the trial and of justice being achieved, whereas for the offender, the process results in punishment, but there is no or little engagement with the effect of the crime, or any suggestion of making things right. Most importantly, whilst retributive punishment does not recognise any role for forgiveness or repentance; the restorative formula considers it to be an outcome at least, even if it

does not have to be part of the process. So, the idea of restorative justice is based on a deep-seated mistrust about the way that the modern criminal justice system appears to be working. What is needed is a fundamental shift in the way we understand criminal punishment.

As Johnstone explains²⁶⁵, there are hundreds of examples of restorative justice processed at work globally. These may include the face-to-face encounter (also known as Victim Offender Reconciliation Programmes), sentencing circles, family group conferences and restorative cautioning. In the UK, the predominant forum for restorative justice has been in the area of youth offending, although interest in it in other areas is growing.

5.2 The emergence of restorative justice in the UK

In his 2010 Green Paper on the reform of sentencing for England and Wales²⁶⁶, Lord Chancellor and Justice Secretary Ken Clarke gave considerable weight to restorative justice processes.

while it is a well established concept in youth justice, restorative justice for adults is sometimes viewed as an afterthought to sentencing. We are looking at how we might change this so that in appropriate cases restorative justice is a fundamental part of the sentencing process. Firstly, this is likely to involve using restorative approaches as a better alternative to formal criminal justice action for low level offenders where the offender and victim agree the outcome such as apologising, replacing stolen items, or making good any damage caused.²⁶⁷

Certainly this approach seems to have permeated recent sentencing legislation, which now has a restorative element. There is a changing climate, which is sympathetic to restorative practices, and where the victims have a role to play. Apart from the inclusion of restorative practices, which will be explained in some detail below, the government of the time commissioned an action plan on restorative justice, and the views of victims are now not just sought but included in every stage of the criminal justice system. It seems, however, that restorative justice has become synonymous with the needs of the victim, and seeks to downplay the role of the defendant and any

²⁶⁵ Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan Publishing 2002) p.4-5.

²⁶⁶ Home Office, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, (White Paper, December 2010).

²⁶⁷ Ministerial Foreword, Home Office, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, (White Paper, December 2010).

possibility of reconciliation, which might arise from a restorative encounter. This suggests that restorative justice is not really receptive to forgiveness and mercy.

Restorative justice has been a key policy driver, especially in youth offending, since the early 1990s.²⁶⁸ Restorative Justice can be used in youth cases, as part of an order on conviction, such as a referral order or supervision order and as part of a final warning or intervention programme delivered by the youth offending service following a final warning²⁶⁹. In the Crime and Disorder Act 1998²⁷⁰, there is a provision for victim-offender mediation in the context of family group conferencing²⁷¹. The Act also contains new powers²⁷² to impose reparation orders on young offenders. The idea behind this policy is to pin responsibility on the offender by getting them to face the consequences of what they have done by writing a letter of apology or engage in practical activities for the victim or the community. The victim's views are sought in this reparation. The Domestic Violence, Crime and Victims Act 2004 offers the introduction of a Victim's Code of Practice²⁷³, which sets out the obligations of service providers to victims. For example, the police are required to inform a victim if a suspect has been arrested and to provide progress reports on the investigation at hand. The Act stipulates that pre-sentence reports assess the impact of the offence on the victim, and there is a Victim Personal Statement scheme²⁷⁴ that allows the victim to state the impact of the crime has had on them. This scheme will make victims aware of the possibility of restorative justice, so that eventually, its use will be commonplace. These statements will be fully discussed in Chapter 6. Perhaps most striking are the provisions in the Crime and Courts Act 2013²⁷⁵ that make it

²⁶⁸ The Youth Justice Board has been promoting restorative justice in youth offending since 1991.

²⁶⁹ Crown Prosecution Service 'Using Restorative Practices in the Criminal Justice System' *Legal Guidance for Crown Prosecutors*, http://www.cps.gov.uk/legal/p_to_r/restorative_justice/index.html accessed 17 August 2014.

²⁷⁰ Sections 65 and 66 introduce 'restorative ideas' to the sentencing of young offenders. This involves a 'warning' system and a community intervention programme as an alternative to prosecution.

²⁷¹ J Dignan 'The Crime and Disorder Act and Prospects for Restorative Justice' [1999] Crim LR 48.

²⁷² Section 67.

²⁷³ Now the Revised Victim's Code.

²⁷⁴ This came into force on 10 December 2013.

²⁷⁵ Part 2 of Schedule 16 to the Crime and Courts Act 2013 inserts a new section 1ZA into the Powers of Criminal Courts (Sentencing) Act 2000 to give this effect.

explicit that courts can use their existing powers to defer sentencing and allow for a restorative justice activity to take place. This will make restorative justice available to victims of serious crime at the first possible opportunity. Initially, this is a pilot in the magistrates courts and 10-12 Crown Courts.²⁷⁶

Some examples of the types of restorative justice processes currently available in the UK include direct or indirect contact between the offender and the victim, aided by a facilitator and often resulting in a rehabilitative programme; community conferencing involving several victims and perpetrators; referral order panels and mediation. There are many localized policies and examples of restorative justice currently in operation and to describe them in full would be outside the scope of this thesis. What is interesting for this discussion, is that the role of the victim in the criminal process is enhanced and that the role of the defendant is nearly always reduced into making reparation for the victim. These provisions all enhance the role of victims in the criminal justice process. The result is that restorative justice can take place at any stage of the criminal justice process, and is becoming an integral part of the criminal justice system. At the same time, however, prison sentences are getting longer, harsher, and more frequent. These contradictions in the criminal justice system, which I highlighted through Norrie's theory of entity relationism, are highlighted in the context of penal reform. The contradictions can be seen in the following statements of guidance to prosecutors:

The final decision whether or not a prosecution rather than diversion is in the public interest is a matter for the prosecutor, not the victim. Prosecutors should give consideration to any reasons put forward by the victim in support of his/her opinion that the offence ought to be prosecuted (or not prosecuted at all). For example, the victim may provide further information in relation to the background or the impact of the offence. However, while the views of victims are important they do not operate as a veto on diversion or prosecution²⁷⁷.

If restorative justice has been integrated into the system, it would seem to be the ideal setting for forgiveness of criminal acts. The movement promises an antidote to traditional, normative theories of retributive punishment by prioritising the

²⁷⁶ Crown Prosecution Service 'Using Restorative Practices in the Criminal Justice System' *Legal Guidance for Crown Prosecutors*, http://www.cps.gov.uk/legal/p_to_r/restorative_justice/index.html accessed 17 August 2014.

²⁷⁷ Crown Prosecution Service 'Using Restorative Practices in the Criminal Justice System' *Legal Guidance for Crown Prosecutors*, http://www.cps.gov.uk/legal/p_to_r/restorative_justice/index.html accessed 17 August 2014.

relationship between victim and offender and encouraging reconciliation and rehabilitation over punishment and vengeance. Surprisingly, even here, forgiveness is recognised only as a desirable end or outcome rather than as any part of the formal processes envisaged by those in favour of restorative justice.

the growing clinical and scholarly interest in the healing potential of forgiveness has pulled restorative justice into the limelight because of its ability to achieve emotional repair for the victim through processes that reduce vengefulness or increase empathy, factors that influence a forgiveness response. In light of the parallels, it would be tempting to align restorative justice with forgiveness and draw the erroneous conclusion that restorative justice explicitly promotes forgiveness.²⁷⁸

In this chapter, I will explain the origins and nature of the restorative justice movement before attempting to identify how forgiveness is, and should be incorporated. What are the reasons for forgiveness in the process and why do some object to its use? Some of those reasons echo those general moral objections to forgiveness described earlier, and some are endemic to the nature of restorative justice processes, felt by many to be successful only where communication is entirely voluntary. Can restorative justice accommodate forgiveness?

5.3 Forgiveness in restorative justice

Compared to retributive criminal justice, it is certainly the most likely model to accommodate forgiveness at present. With its focus on the possibility of reconciliation between the victim and the offender, it seems to be the most appropriate to the idea of forgiveness by a victim of crime. The Restorative Justice Consortium is keen to make the distinction between restorative processes and forgiveness and emphasise that the latter cannot be expected:

restorative justice may result in forgiveness between the people involved. The RJC believes that forgiveness is beneficial and liberating for victims but that it is up to the victim to decide whether they forgive. Restorative Justice provides an opportunity for forgiveness, it does not necessarily encourage it. In this way restorative justice empowers victims to make their own choices.²⁷⁹

²⁷⁸ Mark Umbreit and Marilyn Armour 'The Paradox of Forgiveness in Restorative Justice' in Everett L. Worthington (eds) *The Handbook of Forgiveness*. (Routledge 2005) p.491-502.

²⁷⁹ www.restorativejusticeconsortium.org.

Forgiveness, then, is not a principle of restorative justice, but it provides a context in which it *may* happen. In this way, forgiveness is a matter of personal choice, but cannot be imposed. At the same time, it is difficult to talk of reconciliation and understanding without forgiveness. Undoubtedly if the aftermath of violent crime is to provide any scenario in which forgiveness is possible, then restorative justice is surely the best one available. There is much scepticism towards restorative processes in criminal justice, but also many anecdotal and empirical findings of victims forgiving the perpetrators of the crime which affected them, sometimes to their surprise. Whilst traditional criminal justice provides little or no place for forgiveness, either on proof of conviction or as a factor in sentencing, it is worth exploring to what extent it is a factor in this alternative solution of dealing with offenders.

The various interpretations of forgiveness, identified in Chapter 2 will be useful in assessing the role of forgiveness in restorative justice. One way to see forgiveness is as a unilateral gift from the victim to the offender, which does not depend on repentance or apology to take effect. Even if apology is not needed, forgiveness on the part of the victim may lead to a reconciliation, because it opens up the possibility of trust. Furthermore, it is not only the defendant who benefits here, but also the entire community:

genuine forgiveness transcends the common self-interest and hope of reciprocity, because it is a one-sided step, though it may lead to a better reciprocal dialogue.²⁸⁰

At the same time, Walgrave is clear that forgiveness is not something which can be required:

genuine apologies and true forgiveness are favoured by the context and process in restorative encounters, but they cannot be primary objectives. They are beneficial effects, not explicit goals. If they were delivered under pressure or even ordered, they would lose their meaning. It is the fact of being offered freely as a gift which constitutes their emotional and relational strength²⁸¹

The most famous example of how forgiveness can be seen to be an integral part of the process is in the idea of reintegrative shaming created by John Braithwaite²⁸². In what

²⁸⁰

Lode Walgrave, *Restorative Justice, Self Interest and Responsible Citizenship* (Willan Publishing 2008) p.118

²⁸¹

Lode Walgrave, *Restorative Justice, Self Interest and Responsible Citizenship* (Willan Publishing 2008) p.118.

²⁸²

See generally, John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989).

is referred to as the 'core sequence' of the restorative justice process, the offender must feel shame before the possibility of forgiveness and reparation can be addressed. The core sequence means that there is a process to be completed before forgiveness can even be considered. This takes us back to Griswold's definition of forgiveness in Chapter 2. Repentance, therefore, or at least acknowledgement that harm has been committed is a requirement before a meeting and ultimately forgiveness can take place. In his book, *Crime, Shame and Reintegration*, Braithwaite proposes a process in which shame would lead to reintegration with the community, rather than exclusion from it. In theory, this lays the groundwork for a possibility of forgiveness in a new paradigm of criminal justice. A second important aspect of his theory is that the idea that the offender has to be separated from his act. Valier²⁸³ notes that Braithwaite does not engage with various criticisms of his theory, for example an over simplifying account of community and the problem of sovereign power. I will address some of the shortcomings of restorative justice aiming at evaluating whether we can locate mercy and forgiveness within its boundaries.

Empirical studies on the use of forgiveness in restorative practices are rare but those which have been done, are (for the most part) encouraging. Kathleen Daly²⁸⁴ paints rather a bleak picture of the reality of victim-offender mediation, stating that many offenders are not really prepared to apologise, whilst the thought of meeting the perpetrator often merely reinforced feelings of revenge on the part of the victim. Moreover, from the offender's perspective, she found that apologies were half hearted and were a 'meaningless ceremony', with victims being either too distressed or being the victims of less serious crimes. On the other hand, according to the RISE project (Reintegrative Shaming Experiments) project in Canberra²⁸⁵ three quarters of victims interviewed found apologies made to be sincere which in turn encouraged victims to forgive. The role of apology was explored in the RISE project. Restorative justice allows for the process of forgiveness described by Griswold in Chapter 2. It can be more satisfying for both parties, as forgiveness follows an understanding of what has

²⁸³ Claire Valier, *Theories of Crime and Punishment* (T. Newman (eds), Longman Criminology Series, 2002) p.185-186.

²⁸⁴ Kathleen Daly, Restorative Justice: The Real Story (*Punishment & Society* January 2002 vol. 4 no. 1 55-79).

²⁸⁵ "The Reintegrative Shaming Experiments project has been running in the Australian Capital Territory since 1995.

http://www.aic.gov.au/criminal_justice_system/rjustice/rise.html accessed 3 July 2014.

occurred. This, in turn, can be empowering for the victim, and can allow the offender to understand the effect of the harm caused.

Armour and Umbreit²⁸⁶ identify three ways in which forgiveness could be useful in a restorative justice setting: it can release the offender from the negative power of the crime; it can raise the offender back to the status of a human being; and it can facilitate the offender's route back into the community as a moral citizen. In this sense, forgiveness might also be a useful way to counteract the anger felt by the victim.

For some, forgiveness is the only reason for participating in a restorative justice meeting, choosing it over the usual trial process, because there is a willingness to forgive on the part of the victim. To seek reconciliation without forgiveness keeps the offender safely in the status as an Other. Restorative Justice emphasises the humanity of both offenders and victims and seeks the repair of social connections and peace rather than retribution against the offender. In other words, forgiveness should be an integral part of the process or at least an expected outcome.

According to Jac Armstrong, this is particularly significant given that there appears to be little or no room for forgiveness in traditional justice settings. At the very least, restorative justice should act as a pathway for forgiveness. The way to do this is to allow a sort of 'third way'. There is often an assumption that restorative justice must operate without the intervention of the State, as it is essentially an encounter between victim and offender. The 'third way' advocated by Armstrong would allow some state presence which he argues would reassure victims and probably ensure victim participation:

this method enables the process to draw upon the authority and support of the criminal justice system whilst remaining independent from it and thus free from influence from its retributive, exclusionary paradigms. As a process, restorative justice holds significant potential for both victim and offender healing facilitated through the emotional significance of sincere remorse.²⁸⁷

²⁸⁶ Armour, M., and Umbreit, M.S. *The Paradox of Forgiveness in Restorative Justice* ch30 in *The Handbook of Forgiveness* eds Everett D. Worthington, (Routledge 2005).

²⁸⁷ Jac Armstrong, 'Restorative Justice as a Pathway for Forgiveness – How and Why Should Forgiveness Operate in the Criminal Justice System' <<http://www.inter-disciplinary.net/wp-content/uploads/2010/06/armstrongpaper.pdf>> accessed 4 June 2013 p.6.

Marilyn Armour and Mark Umbreit also refer to the 'paradox' of forgiveness in restorative justice. It is difficult to understand how forgiveness can be part of the process of restorative justice rather than just an outcome. At the same time, it is an integral part of the process, and requires research - research which cannot be easily carried out. In other words, the more the possibility of forgiveness is considered openly and becomes part of the discourse of restorative justice ethics, the more prescriptive it becomes, and as a consequence, fewer people will want to participate. The power of forgiveness in restorative justice processes may then need to remain implicit:

V thinks that he should forgive O, and so V says that he does. The action itself helps V to let go by committing himself to certain future actions. The relevant feelings do not precede the performative actions. Rather, the performative actions serve to generate the relevant feelings....we should not assume nothing of value has occurred when the relevant psychological states are not present. The request for and acceptance of forgiveness has moral value even when it is not genuine.²⁸⁸

5.4 Restorative justice, repentance and retribution

One of the problems with forgiveness in restorative justice is that forgiveness cannot be forced; we find such an argument in Umbreit's discussion of the paradox of forgiveness in restorative justice. Even if forgiveness is freely given, does it depend on the giving of an apology, or atonement, by the perpetrator before it can be granted? On the one hand, a victim may find it easier to forgive, where there is evidence of some remorse and on the other hand, an offender may only provide this where forgiveness from the victim is forthcoming. The problem is that the offender who has to wait for forgiveness is under the power of the victim, and the victim who waits for an apology is still under the power of the offender. If repentance is required, as part of restorative encounter, then in my view, it becomes more akin to the social contract - this cannot be a requirement, just as forgiveness cannot be. If restorative justice provides an opportunity for communication, repentance, remorse and forgiveness may follow. At present, it appears too scantily to be truly effective. Victims must have the potential to express forgiveness, defendants the possibility of expressing remorse.

²⁸⁸ Albert Dzur and Alan Wertheimer. 'Forgiveness and public deliberation: The practice of restorative justice.' *Criminal Justice Ethics* 21, no. 1 (2002) pp. 3-20.

Johnstone raises the issue of power in restorative justice. This is an issue, which may align restorative justice to notions of retributive justice and may indicate that it is not the alternative justice paradigm that it often tries to be:

however much we might welcome restorative justice as a refreshing and in some ways heartening challenge to the drift towards a strategy of punitive segregation, we must never forget that it involves the exercise of some people over others, and that there is an urgent need for critical investigation of the nature, limits problems and dangers of such exercise of power.²⁸⁹

It would be tempting to think that this meant that the offender has power over the victim but the opposite can also be true:

offenders are in a subordinate position to victims in the dialogue by the very purpose of seeking forgiveness: it is the victim's voice that is privileged, at least at the outset of the process. It is likely to be unreasonable at times because victims are allowed to vent their anger and resentment at being degraded by the offender.²⁹⁰

This relates to issues raised earlier in this thesis on power exercised over the offender by the victim and vice versa, and the nature of dignity and forgiveness. In this way, restorative justice retains universal, even retributive, qualities. I discuss this issue further in Chapter 6.

The role of apology in restorative justice is also important. In Chapter 2, I posed the question whether forgiveness can be true forgiveness if it has conditions attached. In discussing Derrida's vision of forgiveness, we established that if forgiveness requires repentance and apology, it may be more akin to the social contract, and have a degrading element for the offender. We saw that Linda Ross Meyer's interpretation of a pre-reason ethics, governing forgiveness, would exclude apology on this basis.

The methods of restorative cautioning adopted so far in the U.K., would accord with this view. In restorative cautioning and conferencing²⁹¹, for example, introduced by the Crime and Disorder Act 1998, offenders are required to reflect on what led them to offend and how they could change that lifestyle in order to avoid repeat offending. Offenders are also persuaded to apologise. Victims are (gently) encouraged to

²⁸⁹ Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan Publishing 1998) p.171.

²⁹⁰ Albert Dzur and Alan Werthimer, 'Forgiveness and Public Deliberation' in *Criminal Justice Ethics*, vol 21, no 1, p.6.

²⁹¹ A meeting attended by the offender, the offender's family, the victim, the victim's family and a trained restorative justice facilitator.

consider forgiveness. In some ways, this resembles a 'tit-for-tat'. On the other hand, it does provide a setting for forgiveness, should the victim desire it. Such a meeting is described in the concluding chapter, in the play, *The Long Road*.

All of these objections may be developed further. In particular, forgiveness in restorative justice may be met with the objection that it is simply unrealistic on the grounds that the offender and victim will rarely want to meet. However, this should not detract from the desire to create a better system:

restorative justice is an ideal of doing justice in an ideal society. Both ideals are utopian views. There is nothing as practical as a good utopia, a beacon of ambition and hope and a safeguard against immobilism and despair. Even if we know that we cannot reach the top of our ideal, and even if we sometimes fall back further from the top, we cannot but keep trying to approach the ideal as closely as possible. If not, our living conditions will deteriorate drastically, just as Sisyphus was doomed to push the rock for eternity²⁹².

Whether restorative justice is the place to find the utopia of forgiveness is debatable.

5.5 Restorative justice, power and the process of forgiveness

In this chapter, I have examined the philosophy of the restorative justice movement, which is closer to being able to accommodate the idea of forgiveness of a perpetrator of crime by a victim than any system simply based on desert. We saw that restorative justice gives a much greater role to a victim of crime and therefore would appear to be a perfect setting in which to allow a victim to forgive, should he wish to do so. We noted, however, that the place of forgiveness in restorative justice is hotly contested, and a number of problems emerge. The problem of power in restorative justice was also considered. It may be that this power dynamic fails to give respect to the offender. In this way, restorative justice can be said to retain a retributive or desert element, as a response to crime. The 'alternative lens' may need more work, both philosophically and in practical terms. In order for restorative justice to work in any context other than the margins of criminal justice policy, what is needed is a 'sea change' in attitudes. Whilst forgiveness cannot be forced, its usefulness should be acknowledged despite some negative studies. Many victims who choose restorative

²⁹² Lode Walgrave, *Restorative Justice, Self Interest and Responsible Citizenship* (Willan Publishing, 2008) p.205-206.

justice, have already started on the path to forgiveness. Even if they do not achieve it fully, the communication process can be invaluable for recovery for both sides. Ultimately, a system that gives restorative justice a more prominent place in sentencing policy, must also remain open to the possibility that victims going through these processes are open to the idea of forgiveness, once emotions and personal relationships are added to the objective proportionality of the adversarial system.

At present, although there are several restorative practices at play, these appear to be afterthoughts. This approach is at odds with a penal policy that seeks to put victims first. One of the problems for restorative justice may be that in some forms, its proponents require an all-or-nothing paradigm shift. This could also apply to forgiveness. Certainly, the position of restorative justice in legislation is changing and policy makers are less resistant to it. It can no longer be asserted that the movement is marginal, especially, as it can be observed most recently in the UK penal policy coupled with a victim-centred approach to sentencing. As we saw earlier, Jac Armstrong advocates a 'third way', in which elements of restorative justice practice are being assimilated into the retributive paradigm. This may also be true of forgiveness and mercy. Also, the traditional dichotomy argument of retributive justice as against restorative justice gives the impression that restorative justice is a softer option. This, too, may be said of forgiveness. In fact, forgiveness is a difficult process for both the victim and the offender. At the very least, restorative practices can be said to have room for forgiveness, as they allow it as a possible outcome. If these practices can conceive of a different way of looking at offenders, then it may be that forgiveness can be tolerated, even if this is only in the context of the offender offering reparation. This is limiting, but hopeful:

proponents of restorative justice, while not denying either the legitimacy or even the usefulness of the resentment which people often feel towards criminals, insist that there comes a point when resentment becomes counterproductive.²⁹³

Forgiveness in restorative justice is essentially a private, ethical gesture, even if it is in a public process. We must differentiate forgiveness from reconciliation. One might reconcile with the inevitability of a situation, but still not be moved to forgive. With its emphasis on reconciliation, and refusal to include forgiveness as anything more

²⁹³ Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan Publishing 1998) p.133.

than a pleasant outcome, the present form of restorative justice may not be able to give a proper account of forgiveness. Forgiveness may still remain a private notion, in the affective realm. Nonetheless, I will argue in the next chapter, that it is important to recognise that the private realm is creeping into the public, as restorative practices and victims' rights become part of the legal process. Restorative justice still retains some of the conditionality of forgiveness. This can be seen in the need for apology in some of its processes and in the inevitable focus on the rights of the victim over those of the offender. Furthermore, forgiveness is rarely seen as part of the healing process, but simply as a outcome. By excluding it from the system and seeing it as an outcome only, the possibilities of forgiveness are restricted, even though some victims may want to express it.

In the next chapter, I will examine whether there is evidence of mercy in judicial decisions. In addition, the role of compassion, that is close to mercy and forgiveness is considered. If there is room for compassion, there is room for forgiveness.

6. LOCATING COMPASSIONATE JUSTICE

Lord, lay not this sin upon their charge.²⁹⁴

In the well-known case of *Dudley and Stephens*²⁹⁵, the victim's brother forgave the defendants, placing the above inscription on the victim's tombstone²⁹⁶. Richard Parker had been sailing with the two defendants on the high seas, in their ship, *The Mignonette*, when they ran into difficulties after a storm struck and they became stranded. After seven days without food, and five days without water, they decided to cast lots to see who would be killed to allow the others to survive. Richard Parker, as the weakest member of the crew, was chosen, and Dudley and Stephens survived by eating his flesh and blood. When they were rescued some time later, they were accused of murder and pleaded the common law defence of necessity on the grounds that if they had not killed and eaten the victim, they would have died themselves. The court found that no such defence could apply. Public opinion had been in their favour, but despite pleas from the victim's family for compassion and mercy, the defendants were sentenced to death, albeit with a recommendation for referral for the Royal Prerogative of Mercy, thus passing the responsibility to the Crown, which commuted the sentence to six months' imprisonment:

There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it.²⁹⁷

There was plenty of evidence that the public felt for the defendants' plight, and that the family wished to forgive. However, the judge could not be seen to be taking into account the victim's views directly, even if, personally, they had wanted to extend forgiveness.

²⁹⁴ Acts 7:60.

²⁹⁵ (1884) 14 QBD 273.

²⁹⁶ Bibbings, L, *Binding Men; Stories about Violence and Law in Late Victorian England* (Routledge 2014) p.24.

²⁹⁷ Para 288 [1882] 14 QBD 273.

In Chapter 4, we saw how the victim's voice is excluded from the criminal trial, except as a prosecution witness, since to include it would compromise the objectives of fairness and objectivity. This applies equally to expressions of vengeance and to forgiveness. At the same time, victims can now express their feelings about the impact that the crime had on them, even though this is to have no effect on the sentencing process. This seems to be the sort of contradiction that Norrie has in mind when he describes the inconsistencies within criminal law. Details of this changing scene for victims will be explored later in this chapter. Given the increased position of victims in the criminal justice process, it is at least possible that their impact on verdict and sentence will also change. Sometimes, as in this case, this will involve a desire to show forgiveness, mercy or compassion to the defendant who has caused them harm. Compassion, of course, is close to forgiveness, in the sense that it is a personal feeling, extended towards another, motivated by sympathy or fellow feeling. If we can find evidence of compassion in the law, whether this is through tolerance of a victim's wish to extend forgiveness, or through compassionate judgments, then the quest for forgiveness may be easier.

As I attempt to discover the existence of forgiveness in law, it will be useful to explore to what extent compassion is present. This is especially true as I am sympathetic to a reading of forgiveness in law on the basis of relations with others, with intersubjectivity or interconnectedness as the focus. In the course of this investigation, I will argue that the emotions *do* have a place as part of a process of forgiveness. In doing so, I will not argue that the retributive view is entirely obsolete, as we have seen that mercy can work even in the context of a model of punishment based on desert. Criminal equity, in the form of a merciful judgment should be acknowledged, further defined and articulated in a better way. I will argue that elements of different philosophies can be used to further our understanding of how a spirit of forgiveness can be tolerated and used in the criminal justice system. In this way, I will advocate a 'middle-road' approach in which aspects of forgiveness and mercy can be assimilated into the present system, and in which aspects of well-defined mercy can be part of this process.

The emergence of compassion in legal settings, along with the increasing prominence given to victims' rights in criminal justice, shows that a place might be found, either in merciful judgments or in victim forgiveness. Is this sort of compassion close to forgiveness, and if so, is there, then, despite appearances, a role for this emotion in the criminal justice process? Murphy argues that the passion of vindictiveness should be revived and respected. In his view, vindictiveness should not be dismissed just because, in some cases, it is allowed to go too far. The same might be said of compassion and forgiveness. We should not dismiss forgiveness simply because, in some case, it goes too far. Why should the 'passion' of compassion and forgiveness not be also used if a victim so desires without risking an accusation of 'flabby sentimentality'²⁹⁸? In Chapter 5, I explored the role of forgiveness in restorative justice. In this paradigm, compassion for the offender is not the main focus. Certainly, in the initiatives for better victim rights, the offender is hardly considered. I will argue, against Murphy, that compassion is beginning to gain greater prominence; and that in fact there is room for less rigidity. In this context, I will explore the area of victim impact or personal statements in sentencing decisions. Traditionally, these have been excluded for being too emotional and partisan, the risk being that a sentencing judge might be influenced by an excessively vengeful, or lenient victim. However, these possibilities are now accepted as being an integral part of the sentencing process and trial, should a victim so desire. At the same time, there is a contradiction here, as they cannot, under any circumstances influence the sentence the judge will pass. This presents the judge with an almost impossible task. It might be better to allow the judge to take victim forgiveness into account along with all the other factors which must be weighed up in deciding sentence.

In explaining this, I will anticipate some of the problems with compassion. In particular, compassion is often confused with pity. If so, it cannot be equated to forgiveness. The problem of the power that the offender might have over a victim, or vice versa, precludes forgiveness and mercy here, at least in the sense of the unconditional forgiveness envisaged by Derrida. Even if punishment, an apology or repentance takes place, it is still possible to show compassion for an offender. It is

²⁹⁸ Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press 1988) p.32.

difficult to say the same for pity.

Judicial mercy and compassionate sentencing are also investigated in this chapter. We saw in Chapters 2 and 3 that the role of mercy in criminal law is the subject of much academic and practical debate. For some, mercy and forgiveness are excluded precisely because they do not accord with the view of criminal law as reasonable, fair and proportionate. Others see mercy as compatible with retribution, in order to perfect justice. In Chapter 5, I explored the role of forgiveness in restorative justice and demonstrated that although this would seem to be the natural arena for the encouragement of mercy and forgiveness, restorative practices maintain a power base which makes true forgiveness difficult, and in essence, normative.

Is it possible to argue that this is not a true representation of the system, and that in fact, we can find emotions such as compassion at work? If these emotions are already there, it might not be too much of a stretch to argue that we may actually find a role for forgiveness, even in retribution and desert.

I then turn to the substantive criminal law, and ask whether we can find evidence of compassion in any of the criminal excuses and defences. In this regard, I will present and discuss Anthony Duff's recent work on compassion and criminal defences, and argue, along with him, that if we can, as we have in the past, accept a defence of a snap reaction and other strong emotions (in terms of provocation), then we can, in theory, also accept compassion as a defence. This is discussed with the caveat and acknowledgement that, of course, this involves compassion for the victim rather than for the defendant. If accepted, however, like the prosecuting guidelines on euthanasia, it demonstrates that the law has room for the emotion. The door may then be pushed open a little further.

In Chapter 4, I outlined some of the objections to the conventional view, setting out the possibility of a redefinition of mercy, and a reshaping of the criminal subject as interdependent. In Chapter 7, I will develop this view, and propose that we consider an example of an interdependent philosophy in practice – uBuntu. This will demonstrate that we can maintain the singularity and dignity or self respect which Murphy is concerned about, whilst at the same time letting go of the damaging individualism which forbids forgiveness and mercy in practice.

6.1 The seduction of compassion

Compassion is usually regarded as synonymous with the: pity, warmth, leniency, fellow feeling and even mercy. Compassion is also the sympathetic understanding of the suffering of another, together with the desire to relieve it, and to suffer together.

Little attention has been paid to compassion in the legal field – still less in the area of criminal justice. Compassion in the criminal law is an unexplored area, although it is growing. Even in legislation and quasi-legislation, we are beginning to see that the term compassion is used. To cite two examples the DPP's guidelines for prosecutors on assisted suicide cite compassion as one of the criteria against prosecution; and as needed in a culture change towards 'caring compassion' in the Francis Report investigating the deterioration of care standards amongst staff at Staffordshire NHS Trust. Whilst compassion for an offender does not fall into the same camp as compassion shown by an offender towards a terminally ill victim, or by nurses in a hospital, it shows that the law is prepared to consider compassion in prosecuting guidelines for a particular offence. The second example shows that, institutionally, compassion might be incorporated into the identity of an organization, where it has previously been lacking. In the same way that the Metropolitan Police were found to be institutionally racist, it is possible, following the Stephen Lawrence inquiry, that an institution might be found to be lacking in compassion.

If forgiveness can be said to be an emotion in which the victim or a judge feels moved to set aside resentment felt after the inflicted harm, then compassion is close to that emotion. We have seen that law does not easily allow these feelings to come into play, even in settings where it might be expected, such as in reconciliation and restorative justice. On the other hand, there is a growing movement to allow the views of victims to be involved in the criminal justice system. Alongside this, there have been significant studies in the field of emotion and the law. This may suggest that the parameters of criminal justice are moving. Signs of the use of emotion in criminal law and sentencing emerge, not only in the case law used to define legal definitions of crime, but also in sentencing. Nonetheless, the term 'compassionate criminal justice system' seems strange and counterintuitive.

According to the Kantian philosophy on which the criminal law is based, personal feelings and emotions, whether of remorse of the offender, or of resentment or forgiveness of the victim of crime have, no place. This is because the system of punishment espoused by Western legal systems is one, which ignores the victim and passes responsibility to a duly elected state. A victim's feelings are thus irrelevant.

Kant would hold that the only basis for judgment is the good will and reason before all else. On the contrary, Kantians such as Murphy, would argue that compassion leads to inconsistency because it is too subjective and biased. A number of factors may influence how sympathetic or compassionate one is likely to be.

Compassion, on the other hand, may motivate forgiveness. Compassion helps decision makers in understanding, and by being a 'natural part of human life', its absence would be noticeable in decisions. This should not be a duty, but rather, there should be room for the victim's voice to be given credence in the sentencing process, rather than to be dismissed out of hand. This could be done by putting a victim's desire to express forgiveness on a statutory footing, for example in a sentencing guideline. This might allow a judge to reduce a sentence which might otherwise be deserved.

In relation to law, Acorn argues that compassion is a dangerous force to consider:

because compassion is buffeted about on the waves of our irrational identifications, because it is ever dependent on the complex politics of compassionate alliance, it is too capricious a source ever to be capable of steering the judge reliably towards the just.²⁹⁹

In her book, *Compulsory Compassion*, she considers the claim that restorative justice is a vehicle for compassion and argues against its use. I will engage with this argument here and hold that in fact restorative justice in the UK at least, makes no claim to be compassionate. On the contrary, it perceives forgiveness and compassion for the offender, as a by-product, in order to make things easier for the victim. In some cases, the victim may feel empowered by the bestowing of forgiveness. However I will argue, further to this, that compassion should not be ignored, where

²⁹⁹ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.121.

the victim desires to exercise it. I maintain that the view of 'restorative justice' Acorn's view is a simplistic one, which argues that all forms of reconciliatory criminal justice to be flawed. In fact, restorative practices include all kinds of scheme, some forgiving and compassionate, some not.

The reason that compassion cannot be exercised in legal judgment is due to the need for an impartial application of rules. This, Acorn says, is the idea that a person in adjudication of others must remain impartial and most of all objective and rational.³⁰⁰ This is possible because the judge imposes a 'fiction of antecedent sameness'³⁰¹ on the defendant – a similar idea to Norrie's 'simulacra of morality', following Macintyre. These are 'tools', which narrow the judge's focus and help him to resist illicit seduction by the emotions.³⁰² Mercy would be one such seduction. To demonstrate this, in relation to mercy, Meyer calls it 'the mad woman in the attic of law' in a reference to Mr. Rochester's insane wife in Charlotte Bronte's *Jane Eyre*:

it is because of the kanticism of our legal system that we tend to treat mercy as the mad woman in the attic of law. Mercy does not treat like cases alike, cannot be analysed as a right subject to an obligation, is associated with emotions and personal relationships...its nature appears to run counter to that of law, which we conceive to be impersonal and egalitarian and universal³⁰³

Acorn makes the very salient point that whilst a judge is not supposed to be swayed by the emotions, this is exactly what advocates try to do when persuading the jury or the judge of the validity of a point of fact or law. Thus, more contradictions are exposed in the system. The danger of allowing a judge to be swayed by the emotions, is that, ultimately, judges are human. Acorn states that that compassion is easiest when it is applied between social equals.

judicial compassion is most easily extended when the judge's circumstances and vulnerabilities are on a par with one of the parties.³⁰⁴

³⁰⁰ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.121.

³⁰¹ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.122.

³⁰² Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice*, (University of British Columbia Press 2004) p.123.

³⁰³ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.11.

³⁰⁴ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.135.

In relation to justice, Acorn says that compassion will have to be shown to be something other than the 'capricious, fickle emotion'.³⁰⁵ She also argues that legal argument would be reduced to a pointless posturing of who has suffered the greatest pain. In the UK, as mitigation hearings do not tend to be so emotive, there may be a place for a judge to consider a wish for compassion on the part of the victim. Another way of seeing compassion is of course to describe it as empathy or a putting of oneself in the offender's position. However, a judge who does this is removing him/herself from impartial decision-making and decisions would not be consistent. This seems unlikely, especially in criminal cases. I would argue that a judge could exercise compassion or at least take it into account, if it is coming from a victim: after all, in weighing mitigating and aggravating factors in sentencing, judges take all sorts of other things into account such as statements from employers and other forms of positive and negative character evidence.

One of the problems with allowing compassion (seen above) in a retributive system of justice is that it may patronise the offender. In other words, if the offender is to be regarded as an individual and respected as having true moral worth, in the Kantian sense (as an autonomous individual), it would be wrong to pity, or to exercise compassion. Connected to this is the power that the victim who is 'willing' to forgive has over the offender. It might also be argued that the offender maintains some of the power he gained from the victim when committing the crime.

restorative justice consistently disregards the possibility that offenders enjoy both violating the victim and hearing the victim's narration of her distress and it disregards the further possibility that the offender might enjoy the victim's suffering even as he knows that the right response is to perform compassion and contrition.³⁰⁶

Compassion for the offender raises the problem that the offender might be acting out of self-interested motives, delivering a performance of compassion and remorse, that makes the victim will see herself as exempt in the suffering of the offender.

This argument implies that we can only feel compassion in these circumstances – a rational, cognitive reaction. It is not surprising that we feel compassion for the

³⁰⁵ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.136.

³⁰⁶ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.148.

offender.³⁰⁷

She highlights a contradiction in restorative justice thinking, arguing that it is too quick to transfer compassion which should be reserved for the victim to the offender:

restorative justice seeks to elicit the pain of compassionate contrition in the offender. However it also holds that it is unjust to meet wrongdoing by inflicting more suffering. This leads to a surge of fellow-feeling. Yet the mark of a truly contrite offender must be a willingness to endure further suffering.³⁰⁸

The result of this is that the offender's suffering ends up being of more significance than that of the victim. Restorative justice therefore conceals the fact that the offender has a self-serving motive to perform compassion and therefore upstages³⁰⁹ the suffering of the victim:

the momentum of the restorative encounter thus takes advantage of the good nature of the victim and community thus riding on the strange but compelling power of that combined discomfort and euphoria we feel over the sinner who repents.³¹⁰

This argument echoes Murphy's assertion, which we discussed in Chapter 4, that forgiveness degrades and is insulting to the victim. Here, Acorn goes further, suggesting that the defendant will enjoy it, and that the victim is powerless. This assumes that the victim is easily prepared to forget her own suffering. I will argue, along with Meyer³¹¹, that this is only true under a Kantian perception of justice and crime. On the contrary, it appears to be more a question of accountability, of understanding the reasons for the suffering.

Furthermore, it is hard to believe that when a victim of violent crime seeks restorative justice she does so to 'forget' her own suffering. It is much more likely to be the opposite; to seek closure, to understand.

³⁰⁷ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.151.

³⁰⁸ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.156.

³⁰⁹ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.158.

³¹⁰ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.159.

³¹¹ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010).

In response to a violent rape, the campaigner Rosalyn Boyce states as part of her narrative for the Forgiveness Project:

the defining lesson that I took from this horrific experience is that we all have the gift of choice. I realised with an enormous sense of clarity that I could choose to continue to live my life in abject terror and fear; I could choose to continue to be a victim with all the negativity that brings – or I could choose to consider myself a survivor. I could choose to free myself from circumstances beyond my control; choose to forgive or not to forgive; choose to continue to see the good in people, to trust and experience life; choose how to spend my days, and indeed how to live my life.³¹²

In this way, pitiful compassion is avoided:

the paradigmatic mutuality of restorative compassion seeks to eliminate the negative connotations of pity – the superiority of the giver of compassion over the receiver. In the ideal restorative encounter, compassion flows between and among all participants in the process; it flows in all directions through the web of interpersonal connections implicated in the conflict.³¹³

Of course, this outcome is not guaranteed. Perhaps, despite this, the risk is worth taking. We can invoke Meyer's argument on the need to take the leap into forgiveness, to trust another:

extending grace to others is not ipso facto ignoble or condescending: it is a humble and courageous risk taking that recognises the difference of the other and yet seeks to tender oneself to the other. Receiving grace is no shame or humiliation but the very ground of responsibility – both giving and receiving constitute us. You are both my gift and my guilt – my mercy.³¹⁴

As the opening quote in this chapter demonstrates, occasionally victims do want to forgive. As I indicated in Chapter 1, this may be motivated by Christian charity and love, or simply a desire, following the Butlerian perception of forgiveness, to 'let go' of resentment and be free of anger. The law will hear such expressions, but it will not influence sentencing.

³¹² Rosalyn Boyce in 'Stories of Forgiveness' at www.the-forgiveness-project.org, accessed 10 May 2014.

³¹³ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press 2004) p.139.

³¹⁴ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.53.

We saw in our review of Kantian-style criminal justice that, according to some views, to allow victim participation in sentencing would compromise key principles of proportionality and objectivity in the criminal trial. Edwards argues³¹⁵ that victims must be kept away from sentencing, especially when they want to extend forgiveness. Ashworth, too, argues that the Kantian principle of just deserts would be compromised, as it would lead to inconsistencies between different offenders. The prosecution and trial of offenders are a matter for the public authorities, not subject to the whim of an individual victim.³¹⁶ Nevertheless, this cannot be feasible in the light of increasing victim participation, however. Also, it can be argued that the views of the victim will often be present throughout the whole hearing in any event, especially where that victim has been a prosecution witness or aggravating and mitigating factors have been presented to the court. This is further evidence of the inconsistencies relating to victims, emotions, forgiveness and compassion.

Victim forgiveness has tangible benefits. It would relieve guilt, lower sentences, help parole boards and help the offender. Bibas presents a compelling way in which forgiveness could be part of the criminal justice system:

the benefits of maximum incarceration are immediate, certain and concrete, while the payoffs from forgiveness and mercy are longer-term, squishier, and more speculative. In striking a balance, we must decide what kind of persons we wish to be. Are we ruled exclusively by fear, or will we also make some room for hope and humanness? Many readers, I hope, will see the intuitive value of taking a chance on reconciling at least the most promising offenders', even in theory, reasoned judgment is not reducible simply to rules. It requires practical, consensual judgments that reflect myriad factors, and one of those factors should be forgiveness.³¹⁷

Acorn's arguments show that there are a number of reasons that compassion on the part of a victim is distrusted. Nonetheless, we must accept the changing role of victim's rights. In particular, the 'voice of the victim' is now commonplace at trials through the medium of victim personal statements.

³¹⁵ Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of 'their' Offenders' [2002] Crim LR p. 689.

³¹⁶ Andrew Ashworth, 'Victim Impact Statements and Sentencing' [1993] Crim LR p.498-509.

³¹⁷ Stephanos Bibas 'Forgiveness in Criminal Procedure' (2007) University of Pennsylvania Law School Faculty Scholarship, Paper 920
http://scholarship.law.upenn.edu/faculty_scholarship/920 (accessed 14 June 2014) p.347.

6.2 Victim Personal Statements

Victim Personal Statements are designed to allow the victim to express how the crime has made them feel. This, as it may be expected, is usually a negative impact and rarely contains expressions of forgiveness. However this does occur in certain circumstances. These circumstances have now been legislated for³¹⁸, and a victim must be told and made aware of the fact that he has the right to make one. As we have seen, the adversarial system of criminal law and punishment really sets victims at the sidelines of the process. In the interests of proportionality and fairness, it is the elected state that has been delegated with the task of administering and imposing punishment. The reality of this position is that the role of victims is more prominent.

In October 2013, the government published the Code of Practice as required by the Domestic Violence, Crime and Victims Act 2004. Inspired additionally by the Victim's Charter³¹⁹, a Charter for Witnesses was produced. Measures included enhanced support for victims of serious crime and the right to make a victim personal statement (VPS). The advice given to victims of crime is as follows:

a Victim Personal Statement (VPS) gives you an opportunity to explain in your own words how a crime has affected you, whether physically, emotionally, financially or in any other way. This is different from a witness statement about what happened at the time, such as what you saw or heard. The VPS gives you a voice in the criminal justice process. However you may not express your opinion on the sentence or punishment the suspect should receive as this is for the court to decide. The court will pass what it judges to be the appropriate sentence, having regard to all the circumstances of the offence and of the offender. This will include taking into account, so far as the court considers it appropriate, the impact of the offence on you as set out in your VPS. Your VPS will be considered in exactly the same way whether or not it is read or played in court.³²⁰

The purpose of the VPS is to give victims an opportunity to state how the crime has affected them - physically, emotionally, psychologically, financially or in any other way; to allow victims to express their concerns in relation to bail or the fear of intimidation by, or on behalf of, the defendant, to provide victims with a means by which they can state whether they want information about, for example, the progress

³¹⁸ Domestic Violence, Victims and Crime Act 2004 s.33.

³¹⁹ Home Office Victim's Charter: A Statement of the Rights of Victims 1990.

³²⁰ Home Office, Code of Practice for Victims of Crime pursuant to s33 Domestic Violence, Crime and Victims Act 2004.

of the case; to provide victims with the opportunity to state whether they want to claim compensation or request support from the Victim Support or any other agency; to provide the criminal justice agencies with a ready source of information on how the particular crime has affected the victim involved.³²¹ It was felt that it was important to use the term 'personal statement' as opposed to the term 'impact' to make the point that the statement is not intended to influence the sentencing process, unlike other jurisdictions, where this might be allowed.³²²

The court is careful to distinguish the role of a victim as being affected by the crime and the role of the victim as a witness. The relevance of these statements for this argument is that victims can be given a voice to discuss the impact of a crime on them physically, psychologically and emotionally, this potentially leaves room for the emotions of compassion and ultimately forgiveness.

Victim involvement is not without its critics, of course, on the above grounds.

criminal justice procedures are intended to turn hot vengeance into cool, impartial justice. They aim to interpose rationality, reflection, circumspection, balance, and collective group interests as a brake upon the unrestrained expression of individual emotions.³²³

Historically, in English law, victim impact or personal statements were not taken into account in the sentencing decision. The restrictive approach of the criminal courts in England and Wales can be seen in the following cases.

In *Nunn*³²⁴ it was said that the court could not be influenced by the views of the relatives of the deceased. Some victims felt merciful towards the offender, while others were obsessed with vengeance. If the opinions of victims were given too much attention, the result would be that cases with identical features would be handled in widely different ways, and there would be improper and unfair disparity. This case

³²¹ Julian Roberts and Marie Manikis *Victim Personal Statements : A Review of Empirical Research* (Report for the Commissioner for Victims and Witnesses in England and Wales , October 2011) p.8.

³²² Julian Roberts and Marie Manikis *Victim Personal Statements : A Review of Empirical Research* (Report for the Commissioner for Victims and Witnesses in England and Wales , October 2011) p.9.

³²³ N McCormick and D Garland 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish' in Andrew Ashworth and Martin Wasik *Fundamentals of Sentencing Theory* (Clarendon, 1998) p.26.

³²⁴ [1996] 2 Cr. App. R(S) 136.

shows that the courts are extremely wary of the role of the emotions in criminal sentencing.

In *Roche* the Lord Chief Justice, Lord Bingham said:

... the opinions of the victim or the surviving member of his family about the appropriate level of sentence did not provide any sound basis for re-assessing the sentence. If the victim felt utterly merciful towards the criminal, as some did, the crime had still been committed and must be punished as it deserved. If the victim was obsessed with vengeance, as sometimes happened, the punishment could not be made longer than would otherwise be appropriate. Otherwise cases with identical features would be dealt with in widely different ways, leading to improper and unfair disparity. The court pointed out that, if carried to its logical conclusion, the process would end up by imposing unfair pressures on the victims of crime or the survivors of a crime resulting in death to play a part in the sentencing process which many would find painful and distasteful.³²⁵

In the case of *Roche*, the applicant pleaded guilty to causing the death of his cousin by careless driving while under the influence of drink or drugs. The court acknowledged that there could be two exceptions to the general rule that states that a court must pass a sentence in accordance with the governing sentencing considerations. The first is if the sentence passed on the offender is actually aggravating the victim's distress; the sentence may then be moderated to some degree. The second exception is where the victim's unwillingness to press charges and forgiveness of the offender indicate that the psychological and mental suffering must be very much less than might otherwise be the case. These exceptions show that it is often too difficult to assess sentencing in this impartial way. How can we tell whether forgiveness has reduced the impact of harm caused? How can we quantify the harm caused to a victim in any event and perform a precise calculation?

For the English courts, neither excessive vengeance nor mercy can be taken into account while determining sentence. This seems incompatible with the information given to victims on the Victim Personal Statements. It does seem to represent a typically Kantian approach to sentencing.

³²⁵ [1999] 2 Cr App R(S) 105.

The words 'painful and distasteful' in *Roche*, are used to emphasise how desert is paramount:

it is of course a cardinal principle of sentencing that it is for the court to pass what it judges to be the appropriate sentence, having regard to all the circumstances relating to the offence and the offender. The system is not one which allows the injured party to dictate the sentence to be imposed, which must always have regard to wider considerations than the wishes of those who suffer as the result of the commission of criminal offences. Just as it is not for the injured party to call for such and such a sentence to be imposed by way of vengeance, so it is not for the injured party to prevail by calling for a sentence well below the level of sentence ordinarily passed. If the court were as a matter of course to accede to a plea for vengeance by the relatives of a deceased person, then it would be appropriate to pay regard to pleas for compassion also. *But the court is not swayed by demands for vengeance and has to be very cautious in paying attention to pleas for mercy.*³²⁶

The only exception to the rule would be in circumstances in which the harm caused could be shown to have been diminished in some way, due to the victim's forgiveness.

The rule in *Roche* had been stated some years earlier in *Hutchinson*³²⁷ which involved a case of rape by a man of his former partner, from whom he was separated. The victim had attempted to withdraw the charge and had forgiven the appellant. The court, while accepting that this was not itself a major consideration because the offence was not only committed against her but against the whole peace of the country, *found that the fact of forgiveness must mean that the psychological and mental suffering must have been very much less in those circumstances* than in normal case of rape. In other words, although the victim's forgiveness is not in itself a reason for mitigating the sentence, for the reasons already given in that judgment, it may probably, and only in a limited range of offences only, be treated as evidence that the damage done by the offence to the victim is less than normally be the case. It seems that the restrictive, Kantian approach may win out. More recently, the problems were restated in the form of some judicial guidelines.

A more recent authority can be found in *Perks*.³²⁸ In this case, having reviewed existing authorities on statements made by a victim in a criminal trial, the court

³²⁶ [1999] 2 Cr App R(S) 105 p.109 (my italics).

³²⁷ [1994] 15 Cr App R 134.

³²⁸ [2001] 1 Cr.App.R.(S) 19.

restated the following principles:

1. A sentencer must not make assumptions, unsupported by evidence, about the effects of an offence on the victim.
2. If an offence has had a particularly damaging or distressing effect upon a victim, this should be known to and taken into account by the court when passing sentence.
3. Evidence of the effects of an offence on the victim must be in proper form, a Section 9 witness statement, an expert's report or otherwise, duly served upon the offender or his representatives prior to sentence.
4. Evidence of the victim alone should be approached with care, especially if it relates to matters which the defence cannot realistically be expected to investigate.
5. The opinions of the victim and the victim's close relatives on the appropriate level of sentence should not be taken into account. The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender subject to two exceptions:-
 - (i) Where the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to some degree.
 - (ii) Where the victim's forgiveness or unwillingness to press charges provide evidence that his or her psychological or mental suffering must be very much less than would normally be the case.

Therefore compassion may be exercised by a judge, after a careful consideration of statements by the victim of crime. This can be in the form of a victim personal statement. Indeed, the guidance on victim personal statements seen above states explicitly that a judge is to avoid making assumptions on the part of a victim, on how the victim has been affected. This strengthens the argument for a more consistent approach to victim impact statements than there has been to date. It is not a reason to reject compassion altogether.

Furthermore, evidence shows that:

there is more support for the expressive rather than the utilitarian purpose of victim input. Thus we found that just over a third of victims gave the reason: 'to express my feelings/ get my point across', whilst 5% cited 'to influence sentencing'. Indeed, this study of victims in Scotland provides strong support for the Expressive function of victim input: Fully half the participants who had submitted a statement acknowledged that they did not know whether the court had considered their statement, yet were still intending to submit a statement in the future in the event of further victimisation. This

suggests that influencing the court's sentencing decision was not uppermost in their minds.³²⁹

Informing a victim that it is important to complete a statement, but also that the statement is unlikely to change the sentence conveys a potentially confusing message. The less obvious, communicative purposes of submitting an impact statement are harder to explain. The consequence is that some victims have unrealistic expectations regarding the role of a personal statement at sentencing; victims may believe that submitting a statement will result in a harsher sentence, or a sentence closer to the victim's position on sentencing.

According to a report on Victim Impact Statements commissioned by the Home Office prior to their incorporation, fears that the introduction of victim impact statements would result in harsher sentencing appear to have been groundless. Emotional appeals for harsher sentences are ignored by judges, who are trained to set aside material that carries no probative value, and which may be prejudicial to the defendant. Crime victims do not generally seek to make sentences harsher and in any event are prohibited from making recommendations about sentencing. Finally, some victims express a wish for leniency in sentencing.³³⁰

As a last note, on victim statements, I will refer to a recent decision. In *Shadbolt*³³¹, the victim expressed a degree of forgiveness to a charge of causing death by dangerous driving. The judge described the victim's expression of forgiveness as generous, and the sentence was reduced as a result of a balance of mitigating and aggravating factors. It was unclear whether the judge's acknowledgement had led to a reduction in sentencing or not. This case demonstrates that the law on these statements is far from clear.

We have examined some doubts regarding compassion, and seen that there are some very practical ways in which victim emotions might be incorporated into the criminal

³²⁹ Julian Roberts and Marie Manikis *Victim Personal Statements: A Review of Empirical Research* (Report for the Commissioner for Victims and Witnesses in England and Wales, October 2011) p.24.

³³⁰ Julian Roberts and Marie Manikis *Victim Personal Statements: A Review of Empirical Research* (Report for the Commissioner for Victims and Witnesses in England and Wales, October 2011) p.27

³³¹ [2014] WL 255/7958

trial. The current use of victim personal statements in the UK is an interesting way in which a victim who wishes to forgive can do so. However, it seems that the statement that a sentencing judge may be swayed on a sentencing decision by such a statement does not ring true, and the assertion in case law that it should not be allowed to influence sentencing, unless the harm to the defendant is reduced, appears naive. Judges are more than capable of considering, and of weighing up a number of factors in deciding which sentence to pass. This is the skill required of a sentencing judge and the reason that discretionary guidelines are applied rather than mandatory sentences.

It must be made clear to a victim that any statement made does not affect the sentencing decision. This makes for a confusing situation. What is clear from these cases is that, despite the agenda of successive governments, since the early 2000s, to involve the victim in the sentencing process, no clear form of victim impact had been adopted. This only serves to exacerbate the contradictions in the system, already highlighted in this thesis. Courts are either adopting a purely Kantian approach and holding that the victim's feelings ought not to be considered in the sentencing process, or they are declaring that this is the case, but in reality they are allowing themselves to be swayed by a statement of a victim. This applies when greater suffering is caused by the crime, and also when there is less suffering (than would normally be the case), brought about by an ability to forgive. What is missing is some clear strategy for a sentencing court to take on board these considerations. Whilst it is accepted that a court should not be swayed by excessive vengeance, it is also agreed that a court could accept the role of emotions in the victim's recovery and reaction to serious crime. It is difficult for a court to distinguish this issue. Once a victim has made the choice to forgive, the language he uses to express the effect the crime had on him will be different from the one used by a defendant who feels vengeance. It will be virtually impossible for a sentencing judge, in these circumstances, to ascertain whether the fact of forgiveness reduces the effect of the harm suffered. It has been accepted that where a victim wishes to express forgiveness, this should be treated as evidence of the harm caused, which in turn has an impact on the harm suffered (the legal retributivist element of sentencing). One might argue that there is an element of luck here, in that a defendant may 'get' a victim who is predisposed to forgive. Arguably, this is no different to elements of 'luck' in other areas of criminal law, such as, in causation and

attempts. A defendant who intends to cause death but by a stroke of luck does not succeed in killing, or a defendant, who does not cause the death as some other event occurs between his initial act to directly cause the victim's death, escapes full liability.³³²

6.3 Implementing compassionate justice

The preceding section has explained the dilemma faced by a sentencing judge in the area of Victim Impact Statements. I have highlighted some of the practical suggestions made by Meyer and Bibas for alternatives. I have suggested that forgiveness extended by a victim could be one factor, with many others, that a judge could use access sentencing. Could the victim and the offender have some sort of mediation at arrest, at least with regard to less serious offences, if desired?

Feigensen suggests that in tort law the concept of 'merciful damages' - a civil law concept might be considered on the following basis:

the magnitude of the harm...is so much greater than that the conduct probably risked that to say 'the harm belongs to you' would impose unjustified suffering...compassion is the appropriate response to the perception of unjustified suffering, and compassion motivates mercy.³³³

In this way, merciful damages would allow decision makers to recognise the difference between the nature of the act and the nature of the actor, when the difference is plain.³³⁴

He concedes:

exercising mercy with regard to damages would be more consistent with Murphy's conception of forgiveness as distinct from excuse, justification, or any other mitigation of responsibility. Forgiveness (and resentment) pertain to wrongdoing that is neither excused or justified; one who forgives recognizes the wrongdoer's

³³² In *R v White* [1910] 2 KB 210 the defendant had intended to poison his mother by putting poison in her bedtime drink. She died from a heart attack before the poison could take effect. He escaped a conviction for murder as the prosecution could not prove that he had caused death.

³³³ Neal Feigensen *Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law*, *Fordham Urban Law Journal*. Vol 27, issue 5, 1999: p1642-3.

³³⁴ Neal Feigensen *Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law*, *Fordham Urban Law Journal*. Vol 27, issue 5, 1999: p.1643.

responsibility but then treats the wrongdoer less harshly than he or she has a right to do.³³⁵

In practical terms in a negligence trial, this would mean that merciful damages could only 'kick in' once the liability part has been satisfied – is this similar to sentencing in a criminal trial? There is a caveat:

because forgiveness and mercy address the tortfeasor and not the tort, the sinner and not the sin, more legally relevant information about the defendant would come before the decision maker, and the subjectivity and bias inherent in compassionate judging would continue to be a risk.³³⁶

The counter argument to this is of course Linda Ross Meyer's argument that this is true only if a reason-based analysis of criminal punishment is accepted as the only valid one. She points out that if compassion on merciful damages is exercised late in the trial the bias issue ceases to be a problem, being confined to the damage award:

in short, just as information not relevant to a capital defendant's guilt or innocence may be admitted into evidence in the penalty phase so that the decision makers can reach a morally superior sentence ? So a damages phase ... in which mercifuls are possible would admit otherwise extraneous party information in order that the court reaches a morally superior award.³³⁷

This may be a good reason to allow the victim's forgiveness in sentencing, since it does not affect guilt or innocence, and as a consequence, the traditional objections to it are not as strong, even on the grounds of reason and Kantian autonomy.

there is a pleasing moral symmetry in permitting tort decision makers to judge mercifully.³³⁸

Public forgiveness is more 'impressive' than private:

only through lawful, public acts can the community affirm that as a community it displays the virtues of moral humility and not always standing on its rights. And because it acts through a public, lawful process, the community can be more

³³⁵ Neal Feigensen Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law, *Fordham Urban Law Journal*. Vol 27, issue 5, 1999: p.1644.

³³⁶ Neal Feigensen, Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law, *Fordham Urban Law Journal*. Vol 27, issue 5, 1999: p.1644.

³³⁷ Neal Feigensen, Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law, *Fordham Urban Law Journal*. Vol 27, issue 5, 1999: p.1645.

³³⁸ Neal Feigensen, Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law, *Fordham Urban Law Journal*. Vol 27, issue 5, 1999: p.1646.

confident that its mercy is morally appropriate, because it is not due to the victim's insufficient self respect....forgiveness and mercy help to reintegrate the defendant into the community, reducing the debilitating social consequences of disconnectedness.³³⁹

Writing about public forgiveness, he says:

it is not inconceivable that a...reduction in the alienation pervasive in consumerist society would ensue if corporate defendants were given an incentive to elicit forgiveness and mercy instead of treating victims of their products as quantifiable variable in calculations of expected accident costs...what little empirical research there is indicates that confessing one's blameworthy actions does indeed reduce observers' anger towards the actor and increases their inclination to forgive.³⁴⁰

Some further practical solutions to this problem have been suggested by Martha Minow³⁴¹. These are not all in favour of the defendant. She acknowledges that by adopting reparative, restorative approaches to criminal justice, we also accord the victim more respect in the criminal trial. This might involve strengthening victim-witness programmes. Most importantly, it is essential to acknowledge that the victims have a range of responses to crime, which may involve forgiveness. Support must be given for victims wishing to exercise those choices. Furthermore, institutional support needs to be given to enable victims to consider alternatives to prosecution, including the possibility of truth commissions and clemency hearings falling in the remit of a wider range of organisations and people.³⁴²

Bibas suggests a more forgiving state-centred criminal justice system, which would benefit victims offenders and community members. The key aspect of this process is that in order to include all of these players, it is necessary to separate the offender from the act that he has committed. This will be discussed in the next chapter in the philosophy of uBuntu. This is such an important step because it paves the way for forgiveness, and stops us from constantly identifying the offender with his crime, with

³³⁹ Neal Feigensen, 'Merciful Damages: Some Remarks on Forgiveness', *Mercy and Tort Law*, *Fordham Urban Law Journal*. Vol 27, issue 5, 1999 p. 1648.

³⁴⁰ Neal Feigensen, 'Merciful Damages: Some Remarks on Forgiveness', *Mercy and Tort Law*, *Fordham Urban Law Journal*. Vol 27, issue 5, 1999 p. 1649.

³⁴¹ Neal Feigensen, 'Merciful Damages: Some Remarks on Forgiveness', *Mercy and Tort Law*, *Fordham Urban Law Journal*. Vol 27, issue 5, 1999 p. 1649.

³⁴² Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice, This speech was delivered at the Anna E. Hirsch Lecture Series, held at the New England School of Law on January 30, 1998. <<http://www.nesl.edu/userfiles/file/lawreview/vol32/4/minow.htm#N>> accessed June 10, 2014.

his deed.

(this) disrespect of the victim's worth justifies the victim's resentment of the offender...it protests the injustice of the wrong, the victim's self worth, and the wrongdoer's abuse of his moral agency.³⁴³

Murphy, as we have seen, disagrees with this, when he states that forgiveness is an internal emotional change, but forgiveness also happens through actions and language. Some repair of the relationship must take place. What the victim gives up as such is his resentment. This echoes Meyer's suggestion that in addition to victim impact statements, defendant impact statements could be considered.

Victim vengeance is less common than we might think. In the next part of this chapter, I will discuss the use of the emotions in criminal defences and the substantive law.

6.4 Locating the compassionate emotions in the criminal defences

In the preceding chapters, we have explained the reasons why, under a Kantian perception of criminal law and punishment, mercy and forgiveness cannot be tolerated. We saw that the two key aspects to this are that Kantian criminal justice depends on reason being at the forefront of legal decision-making. The individual who commits crime makes a decision, for which he is autonomously responsible, and which the State has a categorical imperative to punish. Forgiveness cannot be part of this sentencing and punishment process as it contradicts these sacred principles, and represents emotions that are not reliable. Merciful judgments too, are regarded as valid only on the 'outskirts' of the law, as an occasional example of equity. A victim who wishes to forgive has the possibility of doing so through a victim impact or personal statements, but these are of limited use, if, as the case law shows, judges can not really take account of them.

We have observed, through Norrie, that this interpretation of Kant's moral philosophy is badly conceived, as it fails to take account of the criminal subject as influenced and

³⁴³ Stephanos Bibas 'Forgiveness in Criminal Procedure' (*University of Pennsylvania Law School Faculty Scholarship*, Paper 920, 2007) http://scholarship.law.upenn.edu/faculty_scholarship/920 (accessed 14 June 2014) p.331.

formed by his political and economic environment. The result is a criminal law which is formed upon contradictions and limitations. This is evident in merciful judgments, which sometimes take place despite law's assertions to the contrary. In criminal defences, the court 'excuses' or finds 'justifications' for a defendant's behaviour. In asking the question of why forgiveness cannot be part of the culture of our responses to crime, when it is a part of everyday relationships and culture, attention must be paid to the way in which the criminal law has developed. In particular, it may be worth asking whether forgiveness is in fact already part of the system, but is not actively acknowledged. Earlier we saw that Duff wondered whether the correct place for mercy was in the very structures of criminal law. This could mean in the development and the structure of the criminal law as it defines crimes, namely in the breakdown of criminal liability to notions of *actus reus*, *mens rea* and defences rather than in our responses to punishment. We can only really understand how forgiveness might have a role in or outside criminal law and punishment, if we can be clear about how it is treated already. What are the differences between excusing, justifying and forgiving, or showing mercy? Can forgiveness and mercy be located in the substantive criminal law?

The various defences of excuse and justification might be seen as a form of forgiveness. Could it be the case that one type of defence is close to mercy but that the other type is not? It will be useful at the outset to explain the accepted differences between excuses and justifications. Perhaps the most succinct definition of the distinction is provided by Austin in his article, *A Plea for Excuses*:

in the one defence, briefly, we accept responsibility but deny that it was bad (justifications such as necessity): in the other, we admit that it was bad but don't accept full, or even any, responsibility (excuses defences, such as insanity).³⁴⁴

An excuse is used in a situation where the act committed is morally wrong but certain factors about that morally responsible agent indicate that he cannot be responsible. Infancy and insanity would fall into this category. A justification is a situation in which, although the act might normally be regarded as morally wrong, there are other factors, which prevent the act from being criminal, and the actor from being culpable.

³⁴⁴ John L. Austin, 'A Plea for Excuses', (*Proceedings of the Aristotelian Society*, vol 57, 1956) p.1-30.

Therefore, a justificatory defence, such as necessity, admits that the crime took place but the defendant argues that there was a good reason for doing so.

In terms of excuses, the court is stopping the offender from receiving full punishment (in the case of diminished responsibility or insanity, for example) because he is not fully capable of a reasonable decision. He is not, therefore, being treated as a fully autonomous individual in the Kantian sense. Therefore, the use of an excuse of this nature, is an assertion by the court that the offender does not deserve full punishment. This still seems to be in keeping with a definition of retributive punishment, that the offender is getting what he deserves (a diminished form of punishment for a diminished subject, in the Kantian sense).

Marcia Baron argues that this situation is to be distinguished from forgiveness. If forgiveness is a letting go of resentment, there must be something to resent in the first place. An excuse suggests that the agent was not responsible for what he did at all. If forgiveness has a different meaning, such as compassion for the defendant's circumstances, then we could say that we 'forgive' the person the defendant is, diminished responsibility included.

On the subject of forgiveness, Baron takes Murphy's standpoint that it is only possible to forgive, if you have been wronged – and therefore have standing. Excuses can have set standards, whereas forgiveness being individualistic cannot. He does imply, however, that the distinction cannot be this straightforward. The reasons for forgiving and allowing an excuse to stand, and thereby, reduce the crime may be very similar.

Jeremy Horder also adopts Murphy's view on forgiveness. Could it be the case, that independent standards could judge the appropriateness of forgiveness, as well as, the appropriateness of excuse? He says that this should be possible because just as some things in his view are inexcusable, some things are unforgivable. This is true even though the focus of an excuse and forgiveness are different – an excuse is about the offender, forgiveness is really about the attitude of the victim (or the state, or the community) to the crime, or the wrong committed. It is important to note though that forgiveness may portray the forgiver as weak or as showing what he calls deficiency of character; whereas, to accept an excuse does not:

when we say that something is unforgivable what that means is that to forgive will show me up in an irredeemably poor light, so the thought of forgiveness should not even enter my head. I will have debased the currency of forgiveness, and shown deficiency of character.³⁴⁵

This is Murphy's notion of forgiving as a way of denying self-respect. By overstepping the mark with an excuse, the person may simply have taken too narrow a view of the function of excuses³⁴⁶. Horder puts it another way: that allowing excuses is a way of preserving natural honour.

A less technical approach might be used, however. There are examples of the criminal courts using the language, not the fact of forgiveness in cases of diminished capacity. Leniency may be regarded as a type of judicial forgiveness. Here is an interesting decision from Canada, where a judge was moved to refer to a merciful judgment in place of a form of mental incapacity.

The Canadian courts have held that the common sense assumptions made by jurors on spousal abuse may be erroneous and, therefore, expert opinion about the social context of abused spouses should be taken into account in factual determinations. In *R v Lavallee*³⁴⁷ the court did this. And in the UK, a reference was made to mercy in the following case: In *R v Howell* the Court of Appeal reduced a sentence of 6 years to three and a half years. The wife's use of a gun to kill her violent husband weighed heavily in the 'difficult balancing exercise' which the Court had to perform. In giving its judgment, the Court said:

on the one hand there is the principle that spouses must not resort to the use of firearms however unhappy their marriage is. On the other hand there is the duty of the court to temper justice with mercy, even if a man has died, when there is a history of provocation and violence of the type that is so clearly shown in this case.³⁴⁸

So far we have seen that criminal excuses, such as insanity and diminished responsibility, and to some degree, duress, cannot be equated to 'forgiving' the defendant. This is because these conditions exist independently of the victim.

³⁴⁵ Jeremy Horder, Excuses in Law and in Morality: a Response to Marcia Baron, (*Criminal Law and Philosophy*, 1(1), 1997) pp.41-47.

³⁴⁶ Jeremy Horder, Excuses in Law and in Morality: a Response to Marcia Baron, (*Criminal Law and Philosophy*, 1(1), 1997) pp.41-47.

³⁴⁷ (1990) 1 SCR 852 (SCC).

³⁴⁸ (1998) 1 Cr. App. R. (S.) 229.

I now turn to justifications and ask whether we may find that the criminal courts have used these as a way to forgive defendants. Provocation or loss of control is one defence which makes at least a concession to/forgiveness of human frailty. This is a sort of compassion.

In order to successfully prove the defence of provocation under Section 3 of the Homicide Act 1957 the two following common law elements had to be proven. The court had to ask whether the defendant lost his self-control? Secondly, would a reasonable person have acted as the defendant did?

The courts struggled to find a suitable interpretation of the Kantian reasonable man and what self-control could reasonably be expected of him (forgiven in the same circumstances). One of the most recent interpretations of the law³⁴⁹ concentrated on an almost completely objective test, which did not allow the jury to take into account personal characteristics of the offender. In this way, it was more akin to a defence of justification. According to section 56 of the Coroners and Justice Act the common law defence of provocation is abolished and is to be replaced by Sections 54 and 55 of the Act, which create the new defence of loss of control. Accordingly Section 3 of the Homicide Act 1957 ceases to have effect. Under Section 54 of the Coroners and Justice Act 2009, the defendant will not be convicted of murder and will have their charge reduced to manslaughter, if the following elements can be proven: there is a loss of self-control, from a qualifying trigger, which a person sex and age with a normal degree of tolerance and self restraint, in the circumstances of the defendant, might have reacted in a similar way. A loss of self-control will only apply to an act happening in the spur of the moment where there has been a cause which for some reason the defendant has been unable to tolerate and has caused him to take the required action. The Act specifies certain situations which would not fall within the definition of a loss of self control, for example if the defendant acted in a considered manner for revenge.

A loss of self-control is said to have a qualifying trigger if the defendant's loss of self-control was attributable to the defendant's fear of serious violence against him or

³⁴⁹ [2005] UKPC 23.

another party or the defendant's loss of self-control was attributable to things done or said, which constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of feeling wronged. According to the Act, when establishing, if there was a qualifying trigger, if the defendant's fear of serious violence must be disregarded, if it was caused by an event with the defendant incited and is simply being used as an excuse for the act. Similarly, a sense of being seriously wronged by a thing done or said, will not be justifiable, if the defendant incited the thing to be done or said and is simply using it as an excuse to use violence. If the thing done or said constituted sexual infidelity, this will not be considered in establishing a qualifying trigger for the violence.

If provocation is to be distinguished from revenge, can we say that it is more aligned to forgiveness? The return to the objective test as expounded in *Jersey v Holley* is the confirmation that the law is not prepared to let go of its universal view and consider individual circumstances in a 'merciful' way; and it is, in this instance at least, Kantian.

Might it be possible to view excuses as a form of forgiveness, if the defendant's moral character is considered, and we do not, as Meyer suggests, take reason as the sole basis for deciding morality? If, we see that we are 'with' the offender, forming a relationship with him so that we have a shared memory of the wrong as wrong³⁵⁰, then we may say that the court forgives here. On the other hand, it may be difficult for an offender to remember or to share the pain, in order to settle, if he does not have the capacity to do so.

In contrast, a justification is a plea that it would not be wrong to commit the crime (due to a choice, for example, between the lesser of two evils as in circumstance of necessity). The offender must have a reasonable belief in this situation.

³⁵⁰ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p79.

However, for Baron, forgiveness and justification are even more distinct, as a matter of personal dignity:

if told you are forgiven, or excused, when you think you are justified, you are likely to resent this (especially if you are told you are forgiven).³⁵¹

She notes, however, that one exception to this sentiment is necessity. The link to forgiveness here is that there may still be someone who has standing to forgive. There may still be someone to 'apologise to'.

In the defence of necessity we may ask whether the court is prepared to forgive the defendant for making a particular decision. We have seen the importance of distinguishing excuses from forgiveness, for all the reasons outlined above, most notably that if there is an excuse for something, it eliminates responsibility for the deed for a personal reason (for example insanity). What is more interesting is whether the law will forgive a choice to commit wrong, which is repented. The common law defence of necessity may be the only clear example of a type of judicial forgiveness or mercy.

Traditionally necessity has been viewed as a justification, rather than an excuse, however, an interesting development, particularly in the case for example of a father who steals in order to feed his children, is that the State's power of pardon would be enough to relieve an individual that committed such a crime.

In the key judgment of *Dudley and Stephens*³⁵², mercy was referred to almost directly. As we saw at the beginning of this chapter, Lord Coleridge recommends that although the perpetrators must be condemned, the Royal Prerogative of mercy ought to be exercised. The judgment seems to suggest empathy with the accused, however, utilitarian arguments of cancelling out the defence of necessity prevented the court from exercising that empathy. Compassion cannot find a place.

Norrie maintains that the judgment contains a fundamental contradiction – the judgment states that temptation is not an excuse, but at the same time recommends

³⁵¹ Marcia Baron, Excuses, Excuses, *Criminal Law and Philosophy* (2007) Issue 1 pp.21-29.

³⁵² [1881] All ER 61.

mercy. Does this mean that judges cannot deal with exercising mercy but still believe it is deserved? Norrie cites Fletcher on this point:

there is something inescapably odd about a court's simultaneously affirming a conviction and recommending clemency.... The implication is that the court did not mean what it said, and one is left to ask why they should have arrived at the position they did.³⁵³

On the other hand, could it be an example of a judge showing (for the era) unusual compassion and humanity in the constraints of the law? Norrie puts this seeming contradiction down to a social tension between the judge and the judged. There was a

'social arrangement whereby men like Dudley and Stephens went to sea at great risk to themselves that men like Lord Coleridge could sit in judgment on them when things went wrong.... Such a social arrangement did not exclude the possibility of fellow feeling, but it did impose limits on its practical operation'.³⁵⁴

In other words, judges may have felt compassion, fellow feeling, and forgiveness. However, they could not allow themselves to exercise it:

it must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.³⁵⁵

In relation to victim forgiveness, there was evidence at the time of the trial that the family wished to grant forgiveness, and expressed it in open court. This case is an excellent example of how forgiveness, both from a judicial and victim perspective, was considered by the court and could have been exercised. Dudley was apparently assured by his lawyer before the trial that he would be pardoned:

in the Exeter and London courtrooms, a good deal of sympathy was expressed for the defendants...this approach was even evident in the construction of the prosecution case. It probably reflected public feeling for the sailors, but it may also have demonstrated genuine compassion for the sailors.³⁵⁶

³⁵³ Alan Norrie, *Crime, Reason and History* (Butterworths 2001) p.157.

³⁵⁴ Alan Norrie, *Crime, Reason and History* (Butterworths 2001) p.157.

³⁵⁵ [1881] All ER 61.

³⁵⁶ Bibbings, L., *Binding Men; Stories about Violence and Law in Late Victorian England* (Routledge 2014) p.24.

This compassion may also be demonstrated through the use of the Royal Prerogative of mercy and the fact that the judgments seemed to consist of sympathy and harsh punishment.

Duff argues that our emotions are in fact an important facet of our rational agency.

if fear and anger, the emotions relevant to duress and to provocation, can exculpate as they are allowed to in our existing criminal law, we must ask why other emotions should not be able to play the same kind of role³⁵⁷

Duff suggests that compassion could be used within the substantive criminal law, for example, in the defence of duress and loss of control and proposes that compassion could be a defence to crimes along the lines of justification or excuse. If we allow anger to be a defence, we should also allow compassion as a defence. It has already been stated in this thesis that anger is a 'relevant' emotion in law, in fact, criminal law was seen as the institutionalization of resentment and anger. If anger is relevant, why should other emotions not be relevant?

The title of Duff's article raises his question: if fear and anger can exculpate, why can't compassion or forgiveness? However even where for example with diminished responsibility mental capacity is allowed to exculpate, then it is done so according to the standards of the reasonable observer, This is also true for the test of loss of control always tempered through the objective test based on the reasonable man.

As we saw in our response to Acorn's view of restorative justice, compassion may get round the problem of the superiority of the victim in forgiveness. Compassion for the offender and for the victim and compassion in euthanasia shows that the argument is growing in prominence. This is especially relevant in the context of 'mercy killings'. Duff argues that if compassion is being recognized as part of DPP's guidance or policy for prosecutors, then it ought at least to be recognized as a defence to murder committed in these conditions, in substantive law. He suggests that the victim is not wholly innocent in this scenario.

³⁵⁷ Anthony Duff, *Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?* (Minnesota Legal Studies Research Paper, No 14-05, 2014) p.16.

The DPP's policy also makes sense as a policy of implicitly recognising an excuse based on compassion.³⁵⁸

it could be argued that the DPP, in exercising the discretionary power to decide whether to prosecute, should be guided in part by considerations of mercy or equity, and should attend to the true culpability of someone who has, without any legally cognisable justification or formal excuse, committed a criminal offence³⁵⁹

However, the following caution should be exercised:

to excuse them on the grounds that their compassion destabilised their practical rationality insults them by suggesting that they acted unreasonably or irrationally.³⁶⁰

In the case of *R (on the application of Purdy) v DPP*³⁶¹, Lord Brown argued that what was needed was a published policy that would specify

'the various factors for and against prosecution, ... factors designed to distinguish between those situations in which, however tempted to assist, the prospective aider and abettor should refrain from doing so, and those situations in which he or she may fairly hope to be, if not commended, at the very least forgiven, rather than condemned, for giving assistance.'³⁶²

This is very interesting as the judge refers directly to forgiveness. But that does not require a claim that she was motivated wholly, or even partly, by compassion. The law attends to her immediate reasons for action, and requires that they be constituted (at least in part) by the legally justificatory facts; but it does not attend to the further reasons for which, or to the underlying motives that led her to act for those immediate reasons.

Could compassion be an immediate reason?

whether compassion can properly play a role in justifying the provision of such assistance, as well as the role that I argued in previous sections it can properly play in helping to excuse those who impermissibly, unjustifiably, help their loved ones to die. I suspect that it cannot, but remain very uncertain. Compassion can properly motivate a person to help another to die; actions done from such a motive may be admirable

³⁵⁸ Crown Prosecution Service, Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, 2010.

³⁵⁹ Anthony Duff, Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion? (January 29, 2014) p.17.

³⁶⁰ Anthony Duff, Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion? (January 29, 2014). p.17.

³⁶¹ [2009] UKHL 45.

³⁶² [2009] UKHL 45.at para. 83 cited in Anthony Duff, Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion? (January 29, 2014) p.18.

for just that reason. What justifies the action, however, is the condition of the person assisted and his earnest request for help—not the helper's motives.³⁶³

This section has considered whether it can be said that the criminal defences or notions of *mens rea* already use the emotions. Are we tolerant of the emotions in our definitions of defences? Are the defences similar to forgiveness in a judicial sense?

It seems that the language of forgiveness is used. However it also seems that the criminal law especially of late, is even more insistent on the standards of the reasonable man with regard to loss of control under the Coroners and Justice Act 2009. The Canadian case shows that there are ways around this. The common law defence of necessity may be an example of a defence where the courts are prepared to show mercy to a defendant caught between the lesser of two evils. This is a form of judicial mercy. It seems, that if we look hard enough we can locate forgiveness in the criminal law. It is obvious that many of the key principles in the criminal law still encompass the Kantian ideal of reason. At the same time, there is evidence of mercy, a non-Kantian construct, in some criminal defences, and in sentencing.

6.5 Articulating mercy and forgiveness

In this chapter, I have explained that the role of the emotions in the criminal law is disliked. Traditionally, on the edge of the system, victims have not been allowed to express their views. I have argued that it is possible to see mercy at work in some types of criminal defence, although the majority still affirms the Kantian perception of the criminal subject as the reasonable man.

The introduction of victim personal statements allows victims to tell the courts (and the defendant) how they feel; however forgiveness (and excessive vengeance) is not taken account of as part of the sentencing process. This appears to be a contradiction, as judges will not be able to help but listen to, and be affected by those statements. It could be argued that victim impact statements are caught somewhere between desert and retribution and the idea of restorative reconciliation. A judge will be able to weigh up the effect of those statements, as he would do any other mitigating factor, without being unduly prejudiced. To be told to listen to a statement, but then to

³⁶³ Anthony Duff, *Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?* (January 29, 2014) p.22.

exclude it from any sentencing decision on the basis that it represents the emotions of the victim, does not do justice to the judge's power of reasoning and ability to adjudicate fairly. Judges, after all, listen to all kinds of emotional statements during a trial and as part of aggravating and mitigating submissions before moving to sentencing. As Meyer suggests, a 'forgiveness' statement could be treated like any other piece of evidence.

It can be argued, against Acorn, that the use of compassion, especially in restorative justice practices, allows the victim to claim back some of the power lost when the crime was committed. This, of course, makes the forgiveness model sound like an exchange relation, returning us to retributive values, but it does answer the charge of over-pity. Some practical suggestions, including mediation, the use of dialogical sentencing hearings, and the better articulation of mercy, were also discussed in this chapter.

In the next chapter, I develop the role of compassion in criminal law further, and argue that if compassion is allowed, this might pave the way for a theory of forgiveness. If, as Meyer contends we can challenge the Kantian view that reason is the only morality, we must then find a way to account for the criminal subject.

Meyer suggests that 'being with others' is a possible alternative. She proposes sentencing as settlement. We have seen that restorative justice tries to reconcile the victim with the offender, with forgiveness as a possible, but not a compulsory outcome. If compassion is recognised by the courts, it may be possible that we can suggest a different way of constituting this criminal subject. I will take Meyer's argument further than being with others and suggest that we are not only two parties willing to settle, but that forgiveness can be possible with criminal law because of the relationships that we have with others. This was touched upon earlier, when we consider the relational responsibility angle suggested by Pillsbury and Ammar, but it has not been fully developed to date.

This idea was successfully given legal force by the Truth and Reconciliation Commission in post-apartheid South Africa, with the traditional African philosophy of uBuntu incorporated into the terms of reference of the Commission. It is understood that the Commission was responding to the needs of a very particular

problem – that of reconciling and creating a state after years of oppression. I am not suggesting that anything similar would be in use here. However we can learn from the legal philosophy of the Commission (and as we shall see, national jurisprudence in recent times) and recognise that there is an alternative to the Kantian way. Forgiveness moving from a victim to one who has harmed him is, in Meyer's words, a gift to the guilty. Whether the offender is actually forgiven may be less important than giving the victim an opportunity to express feelings of forgiveness at the trial. Likewise, a defendant could also have the opportunity to make a statement. Recognising that forgiveness is a fluid concept, which changes with time and circumstances is one of the ways in which we can understand and visualize forgiveness as a process.

Viewed in this way, forgiveness is a possibility. It also means that objections to victim forgiveness, such as Murphy's point about self respect, and the central position of the reasonable man, give way, as the focus is no longer on the reasoned individual, but on the nature of the interconnected subject bound up with others.

7. FORGIVENESS AND THE INTERCONNECTED SUBJECT

no man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as any manner of thy friends or of thine own were; any man's death diminishes me, because I am involved in mankind. And therefore never send to know for whom the bell tolls; it tolls for thee.³⁶⁴

In Chapter 3, we saw how the principal criticisms of the Kantian system of criminal justice are two-fold. Firstly, Norrie sees no recognition on its part of the subject-citizen, who cannot help but be influenced by the political, economical and social environment in which he lives. Instead, Kantian-influenced systems of law and punishment have a myopic view of that individual³⁶⁵, who is abstract, and imbued with no special characteristics other than his agreement to accept punishment on transgression, by virtue of being a citizen. There are implications for the place of forgiveness and mercy here. The false split between actual individuals and abstract, juridical ones results in a criminal justice system which is riddled with inconsistencies, as judges, being human, pass judgments with elements of mercy in them. I explained in Chapter 6 that this view of the criminal law is played out in the current approach to victims, especially with regard to victim personal statements, whereby judges are expected to listen to the impact of a crime on a victim, without taking this into account in their sentencing. This particular contradiction may be partly explained by the move from the personal, reconciliatory approach to the retributive form of justice, which was outlined in Chapter 2. Furthermore, we know that the emotions, such as compassion, are already being used in the criminal law. Forgiveness cannot be so far removed from this. We saw in Chapter 5 that although restorative justice would seem to be a good platform for victim forgiveness, it actually retains retributive qualities, and is not prepared to recognise forgiveness in its paradigm. One of the criticisms of restorative justice is that it lacks an overarching philosophy, and this may be why the position of forgiveness within it is unclear. I also established, in Chapter 6, that judges are exercising mercy in the criminal defences, but not in a consistent or defined way. Leniency is being used, when mercy would do.

³⁶⁴ John Donne, 'Devotions Upon Emergent Occasions', Meditation XV11, in Henry Alford (eds) *The Works of John Donne*, vol 3 (John Parker, London) p. 574-5.

³⁶⁵ Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press 2000).

Mercy, when exercised, is a public, political statement to the community, in the form of a merciful sentence. Forgiveness is a private gesture from a victim who has been harmed towards the offender, the one who is responsible for the harm. It can therefore be said that forgiveness belongs, not to the public sphere, but to the private, ethical sphere. This theme will be developed in this chapter, as I will argue that, in fact, these spheres are closer than might be imagined.

In Chapter 4, we saw how Linda Ross Meyer draws on the philosophy of Levinas to argue that the law's antagonism towards mercy only holds true if reason and individual autonomy are taken to be the ground of morality. For Meyer, the Kantian view excludes any notion of 'being-with-others'. According to this Kantian interpretation, the defendant must take full responsibility for his actions. This acceptance of responsibility involves, in turn, an acceptance of punishment. However, if our approach to morality changes, and reason and individual responsibility are no longer seen as paramount, then forgiveness and mercy are possible. The reason that forgiveness and mercy are not possible in the Kantian ideal is that they are seen as irrational and threatening to an objective, abstract conception of justice. Meyer shows us that we use a different philosophical approach, we can find a place for mercy and forgiveness, as nothing is threatened. She suggests impact statements in sentencing, to include not only the effect of the crime on the victim, but also on the defendant, thereby including any remorse, or discussions of forgiveness between the parties. This is one way to separate the actor from his act, to recognise his humanity and concentrate on the wickedness of the deed, rather than the moral wickedness of the person. This facilitates forgiveness. Military trials, for example, take account of any circumstances that might have affected the defendant's decision making.

This argument on character judgment would accord with the argument that forgiveness belongs to the realm of the ethical. The role of the subject, in the realms of the ethical and the political, needs to be discussed at this point. I will explore the idea of the political and private, ethical nature of forgiveness in this regard. I will also explore the ways in which a theory or paradigm of forgiveness in criminal law might be supported by Levinas. I will suggest that mercy and forgiveness might be founded theoretically at least on this basis. I want to take this argument further, however, and introduce the idea of the interconnected subject, rather than the subject who is

individual, abstract and governed by reason. Pillsbury's idea of relational responsibility, Holmgren's paradigm of forgiveness and Clute's unitive, rather than punitive justice, are all related to this idea. I will build on, and critique these ideas which were introduced in Chapter 4.

I will argue, however, that a better way to proceed would be through a philosophy that espouses the ethical call, whilst still retaining singularity. Furthermore, the public domain of mercy needs to be better defined. I propose to offer a different approach, one that has been espoused by the Truth and Reconciliation Commission in South Africa. This is an example of how forgiveness and mercy are, through the philosophy of uBuntu, directly incorporated in the law. This is a philosophy of justice, which has adopted this notion of interconnectedness, and in fact, has even in recent times incorporated it into new legislation and principles of domestic law. uBuntu holds that recognition of the other is an integral part of how we live, and therefore, that this is to be reflected in the processes that govern our lives. Even if such Commissions can be isolated due to the unique circumstances which gave rise to their existence, later initiatives in South Africa – to incorporate the principles of uBuntu to other forms of legislation (with a common law background) show that in fact uBuntu need not be confined to this type of quasi-legal commission or inquiry. It would be interesting to consider whether this approach to criminal justice could inform views of punishment. This can be done without a wholesale rejection of the current system, in small but effective ways. These include Meyer's suggestion of impact statements and Bibas' idea of dialogical sentencing hearings.

7.1 Levinas and the face of ethical forgiveness

As I explained in Chapter 4, Linda Ross Meyer suggests that we reject an understanding of morality and law deriving from a 'kanticism'³⁶⁶, which can be described as a moral code based on reason and individuality alone. This distorted notion of Kantian philosophy means that we reject anything that presents a challenge to an understanding of the criminal subject as anything other than an abstract construct. In other words, we cannot, for example, take into account any

³⁶⁶ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.11.

circumstances which might have influenced the decision to commit the crime. This might include any number of personal circumstances, which, in everyday life, might be inclined to influence how we treated a wrongdoer. The law has no place, in theory for a merciful outcome. A normal criminal trial does not really take into account the moral character of the defendant, and to be merciful would unduly prejudice others who might be inclined to make the same decisions. A merciful judgment would not treat similar cases in similar ways. Furthermore, a judge cannot be swayed by the emotions, or be influenced by the victim who feels these (in the form of either vengeance, or compassion). This idea was explored in Chapter 6.

Another way of perceiving this criminal subject is not as one who has broken the social contract, but as one for whom we are responsible, from the outset. In Chapter 4, I introduced Meyer's view that we take the Heideggerean concept of Dasein and the pre-ethical understanding of the ontology of Levinas as a basis upon which we create a morality that makes mercy and forgiveness are possible. This idea is now explored in greater detail. We will see that this is, as Meyer suggests, one way of viewing an alternative paradigm. If Kantian philosophy does not allow us to use mercy and forgiveness in the criminal justice system, because they are an affront to reason, can the philosophy of Levinas help us, as Meyer asserts? The first point to make is that Meyer may be viewing Levinasian philosophy somewhat simplistically. Certainly, if reason is not taken as the core of morality, then there is, as we have seen, room for forgiveness and mercy with a different justice paradigm since the traditional objections no longer hold true. However, Levinas does not reject Kant completely, and it may be that we need to take aspects of his thought to allow the criminal justice system to be inspired by it. At first sight we can say that Levinas' conception of our responsibility to the other would include a responsibility to one who has harmed us. This would include proximity to the person who has been violent towards us.

What Meyer does not elaborate upon, in any real detail, is the possibility of seeing the subject *through* others, who are also dignified, singular individuals. What must be highlighted from this, as I will demonstrate through my reading of Cornell's work on uBuntu, is that Levinas preserves the identity and singularity of the individual, all the while reaching out to others. I will attempt to bring this point out in my analysis of Meyer's work. I will therefore argue, that the philosophy of uBuntu is a better way of

approaching a justification for mercy, and one which has been successfully used in a substantive and procedural legal setting. I will develop this argument in this chapter.

The philosophy of Levinas takes an entirely different standpoint to most Western ontologies. I do not propose in this thesis to undertake a full analysis of Levinas' philosophy, but instead will focus on how certain aspects of his thought have been employed, for example, by Meyer, to demonstrate how the current climate of criminal law and punishment may, wrongly, refuse to accommodate mercy. I will then assess to what extent his thought is in fact appropriate for a theorizing of mercy and forgiveness.

We saw in Chapter 3, how a Kantian view of morality places emphasis on the autonomy of the subject, who is guided by reason to behave according to certain 'categorical imperatives'. Reason is thus the foundation of ethical and moral behaviour. Levinas offers a different way of seeing the 'subject'. As Loizidou puts it:

Levinasian ethics is concerned with undoing the normative and universal standards that moral philosophy raises.³⁶⁷

Levinas seeks to critique Western ontology. The problem as he sees it is that there is an inherent tendency to generate totalising concepts of being.³⁶⁸ Furthermore, universal concepts mean that we tend to exclude a consideration of the 'Other'. It is important here to elaborate on Levinas' presentation of the subject. Ethics requires:

a subject that is spontaneous, unreflexive, uncalculative and which does not reduce exteriority to universal standards, but retains its difference³⁶⁹

An ethical life is something, which *precedes* reason. We are already responsible to others. Levinas' approach to the other can be described in this way:

we are not fundamentally beings that are rational...rather, we are fundamentally ethical beings.³⁷⁰

³⁶⁷ Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish 2007) p.51.

³⁶⁸ Simon Critchley, *The Ethics of Deconstruction: Derrida and Levinas* (Blackwell 1992) p.5.

³⁶⁹ Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish, 2007) p.53.

³⁷⁰ Colin Davis, *The Cambridge Introduction to Levinas* (Cambridge University Press 2011) p.4.

In Levinas, the terms 'Saying' and 'Said' are used, respectively, to describe 'ethical language' and 'ontological language'. As Loizidou explains, Critchley 'translates' these terms into, again, respectively, performative, and 'constative'³⁷¹. These terms can be useful for me in analyzing forgiveness and mercy in the ethical and the political, in the public and the private spheres.

Forgiveness, as a private act from victim to offender, is the Saying, that is often performative. It can do what it sets out to do. However, although it is expressed, it need not (and often is not) be fully achieved. What is important is the expression as a starting act and movement towards the other. This is the ethical act, the moment when the victim can relate to the offender, the moment of the call to the other. This is before the intervention of the law, the Said. The Said, or constative, is the Kantian law, which prevents the Victim Personal Statement from being taken seriously by a judge. However, it is the experience of the event, the call to the other, which is important. It needs not be attached to the Said, to the truth. In a similar way, the expression of forgiveness need not be attached to a normative condition, or even to actually forgiving.

I will not dwell on this further at present. However, I would like to point to what Davis claimed regarding Levinas' philosophy: that there are elements of reason in Levinasian thought, which prevent the call from the other from being purely ethical, purely within the realm of the Saying:

Levinas suggests that the experience of the event, the magnetic pulling toward the other that suspends reason, comes before consciousness...but to say this, he relies precisely on the fact that there is a consciousness that thematises phenomena..³⁷²

Again, Loizidou prefers Butler's analysis that ethics can take place in the public sphere of language and politics. I also prefer this analysis, but feel that it is important to recognise that it does not become public. When it comes to forgiveness and mercy, there is a hybrid of public and private, of retribution and reconciliation. We should recognise that judges have human qualities and show mercy, that victims want a voice

³⁷¹ Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish, 2007) p.58. Critchley's analysis is based on Austin's theory of performative action.

³⁷² Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish, 2007) p.59.

to forgive, as well as to see punishment taking place:

if we are to be able to have livable and viable lives, lives that will be free of the burdens of universal moralism, differentiation and exclusion then we need to think of the subject along Levinas' lines (as his subject, ultimate desire, is the inclusion of difference) but within the zone of indistinction of the public/private.³⁷³

This 'zone of indistinction' can be between the public and private, forgiveness and compassion, between the emotions and judgment. That which we characterise as emotional may well be cognitive, and vice versa:

there is a blurring of boundaries between the public and the private...we need new metaphors to help us build this world together...that of commitment and values. I would further suggest that the boundaries are blurring between the emotions and judgment or reason, and that we need to find a way to avoid accenting one term over the other.³⁷⁴

An example of this is trust, which is a judgment, but also a gift³⁷⁵. The same might be said of forgiveness. To span both worlds, it can be represented in merciful sentencing and statutory recognition of victim-led forgiveness.

Can Levinas inform or understanding of a public interpretation of mercy? The ethical approach to the other precedes everything, including the political. If the legal system forms part of the political, then it is difficult to see how a paradigm of mercy and forgiveness can be justified using a Levinasian interpretation of ethics. The 'pull' to the other exists before law, or politics. We are ethically responsible to the other, but this cannot be accounted for in the sphere of justice. This is an echo of Derrida's statement, explored in Chapter 2, that asserts that forgiveness cannot exist in the juridical or the political sphere. However, I would argue that it does. Loizidou shows that a traditional understanding of the subject (as a rational self) is undone through thinkers such as Levinas and Butler. This traditional understanding is that

³⁷³ Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish 2007) p.59.

³⁷⁴ Kathleen Woodward, 'Calculating Compassion' in Lauren Berlant (eds) *Compassion: The Culture and Politics of an Emotion* (Routledge 2004) p.82.

³⁷⁵ Kathleen Woodward, 'Calculating Compassion' in Lauren Berlant (eds) *Compassion: The Culture and Politics of an Emotion* (Routledge 2004) p.82.

moral philosophy corresponds to moral normativity....(this) subject ..is ordained with particular characteristics: it is self-conscious, rational and able to reduce its conduct to a pre-ordained understanding of a right-action, what we might call same-ness.³⁷⁶

The 'call of the other' is reduced, in normative terms, to a standard duty, a categorical imperative, in Kantian terms. Loizidou describes Judith Butler's 'unease' at 'moral philosophy and its universalized presuppositions of what is considered the good life and the right action'³⁷⁷. The traditional view of ethics (in the sense of moral, right, action) is translated into universal rules. Levinas' subject, on the other hand, 'retains its difference'³⁷⁸ in answering the call of the other.

In terms of forgiveness, there may be a universal rule to punish, but the difference creates a different kind of ethical call, which requires us to show forgiveness. Punishment may be just, but it is not ethical, in the sense in which Levinas means it. The call to punish is universalisable, but the call to forgive is not, it is a responsibility that we cannot avoid. Forgiveness falls into this category:

spontaneous conduct puts aside considerations of duty...because one acts, despite oneself and despite the commands of the universal law, one does not reduce the call of the other to the same (universal law, ego).³⁷⁹

The difficulty is in conducting this in the public sphere, such as in a rule of law, a lenient sentence, or a procedural issue such as victim personal statements. Loizidou perceives this division as a worrying one – the reality is, in fact a hybrid, as

the differentiation between ethics and politics, or the intimate and public sphere proves to be imaginary...affects such as love, hate, disgust and compassion have traditionally been located as a matter of private relations, they are not completely so...Levinas reproduces the classical divide between public/private³⁸⁰

We saw in Chapter 6 that this is very much the case in relation to mercy shown by judges in defences. If forgiveness is to be located in restorative justice at all, it is now in the public domain since these practices are now incorporated into the law (see

³⁷⁶ Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish 2007) p.52.

³⁷⁷ Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish 2007) p.53.

³⁷⁸ Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish 2007) p.53.

³⁷⁹ Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish 2007) p.53.

³⁸⁰ Elena Loizidou, *Judith Butler: Ethics, Law, Politics*, (Nomokoi Critical Thinkers Series, Cavendish 2007) p.56.

discussion in Chapter 5)

A further criticism of Levinas is that this call to the other can only really be done through language

'either in a phonetic or silent way...language, since it pre-exists subjective formation and is the medium through which the subject is transmitted...is public. Levinas' private ethical relation proves not to be private, precisely because it is communicated.'³⁸¹

This is true for both the stories in the Truth and Reconciliation Commission (a private arena), and of the stories in the Forgiveness Project (that are private relationships given a public outlet) even if this is not true for the courtroom.

Loizidou's study of Judith Butler's ethics, which are located in the public sphere, may be a better example for forgiveness and mercy. Perhaps their place is in both, especially since I have indicated that the lines between private and public, especially in criminal law, are less clear.

The idea of the call to the other is demonstrated in Levinas' metaphor of the 'face' of the Other. It should be viewed metaphorically, as Linda Ross Meyer suggests:

the face is not a literal face, of course, but a philosophical metaphor for the idea that I know immediately that the other I confront is also a personality who experiences, feels and speaks even though I cannot presume to know what is given to him to know.'³⁸²

Loizidou points out that Levinas' metaphor of the face symbolizes the difficulties of conceiving of a subject without language. Derrida critiques Levinas on this basis:

his emphasis on the face-to-face relationship, an attempt to escape the emphasis on speech and to this effect language that dominated Western metaphysics, is in itself a sign of metaphysics.'³⁸³

There is also a danger in using this to create overarching theories, which, for Levinas, were to be avoided. The point is that ethical responsibility is particular, rather than universal. I feel that this is a point that Meyer may have missed. Levinas has, as Davis

³⁸¹ Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Nomokoi Critical Thinkers Series, Cavendish 2007) p.56-57.

³⁸² Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.39.

³⁸³ Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Nomokoi Critical Thinkers Series, Cavendish 2007) p.59.

points out, a Kantian strand³⁸⁴ in his thinking, in that he values the singularity, the particularity of the subject, but maintains that that subject is indelibly called to the other subject, who is also dignified in his or her particularity, too. He must, however, be distinguished from universal, catch-all theories of human experience, duties and right:

what is surprising about Levinas, however, is that while he clings to the centrality of our utter particularity, he takes it to be tied to ethical obligation that is prior to all of this complexity and even to the moral universality characteristic of Kantian and utilitarian moral theories.³⁸⁵

A useful article on the line between justice, hence politics and the ethical is provided by Julia Ponzio in Marinos Diamantides' *Levinas, Law, Politics*³⁸⁶. It is not abundantly clear whether Levinas completely excludes the political from his understanding of totality. She cites from the last paragraph of *Totality and Infinity*:

in the measure that the face of the other relates us with the third party, the metaphysical relation of the I with the Other moves into the form of the We, aspires to a State, institutions, laws which are the source of universality. But politics left to itself bears a tyranny within itself, it deforms the I and the Other who have given rise to it, for it judges them according to universal rules and thus as in absentia.³⁸⁷

Levinas refers here to a politics left to itself. Does this leave open the possibility that politics can accommodate justice? In this way, although universal theories are to be avoided, the alternative of allowing this 'tyranny' may not be preferable. In terms of Meyer's argument, then, it might be appropriate to consider a paradigm in which reason is not the basis of all ethical encounters, and to adopt an understanding of our relationship with the Other that is based on ethical responsibility. This leaves some room for mercy and forgiveness. If these virtues are not considered, there is a danger that the alternative is even worse.

³⁸⁴ Colin Davis, *The Cambridge Introduction to Levinas* (Cambridge University Press 2011) p.14.

³⁸⁵ Colin Davis, *The Cambridge Introduction to Levinas* (Cambridge University Press 2011) p.10.

³⁸⁶ Julia Ponzio 'Politics Not Left to Itself: Recognition and Forgiveness in Levinas' *Philosophy* (eds. Marinos Diamantides, M., *Levinas, Law, Politics*, (Routledge Cavendish 2009).

³⁸⁷ Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority*, cited in Julia Ponzio 'Politics Not Left to Itself: recognition and forgiveness in Levinas' philosophy' (eds. Marinos Diamantides, M., *Levinas, Law, Politics*, (Routledge Cavendish, 2009) p.47.

This is, according to Ponzio, the danger of leaving politics to itself:

politics left to itself is therefore the politics that has forgotten the relation with the other that cannot recall the gleam of exteriority of transcendence in the face of the other, who is forgiveable without need for justification. It is a politics, in sum, that is unable to trace the condition of its possibility, of a situation where politics breaks up. However a politics not left to itself ... is the possibility of the relation between totality and its beyond, forgiveness marks the border between the intimate society of the *entre nous*, in which forgiveness is not the result of justice but of recognition of the unjustifiable, and the real multiple society in which at the expense of forgiveness, justice requires the recognition of justification. Forgiveness is about ethics, the Feminine, justice (justification) or the other as third.³⁸⁸

This concept of the Feminine is the 'irreplaceable' otherness in the Other. The 'third' is a different way of seeing the Other, as the one I am responsible for. I have already explained the Saying and the Said, the ethical and the political. The Said, the political, the world of justice, has no room for forgiveness. The Saying, which is ethical, can contain mercy and forgiveness. It takes place in the '*entre nous*', before the appearance of the 'third', and of justice.

The call to the other, which I have described, is there because of the Feminine, because of this otherness. It is not sullied by his politics, by his position in the political world, but simply because he *is* other. Forgiveness is possible in the space between me, and the other. This can be interpreted as other people, the community. As soon as I am called to account by the community, then forgiveness loses its meaning, as it belongs only to the ethical. Forgiveness, therefore, for Ponzio, occupies a very special place: between the ethical and the political. This accords with the argument I presented above, through Loizidou:

the possibility of forgiving marks the border between relating to the other as Feminine and to the other as third who bursts into the intimate space of the *entre nous* asking for a justification....forgiveness is then crucially placed at this very important passage from the ethical experience to that of the justice.³⁸⁹

³⁸⁸ Julia Ponzio 'Politics Not Left to Itself: Recognition and Forgiveness in Levinas' Philosophy' (eds. Marinos Diamantides, M., *Levinas, Law, Politics*, (Routledge Cavendish 2009) p.42.

³⁸⁹ Julia Ponzio 'Politics Not Left to Itself: Recognition and Forgiveness in Levinas' Philosophy' (eds. Marinos Diamantides, M., *Levinas, Law, Politics*, (Routledge Cavendish 2009) p.37.

In order to critique and understand whether Meyer's assertion can work in the current criminal justice system, it will be necessary to explore how Levinas saw forgiveness and mercy. We have already established that, ethically, Levinas sees that we have a fundamental responsibility to the other, even to the one who has harmed us. This would include the victim's responsibility to the offender, and the offender's responsibility to the victim. It will be important to understand whether, following our discussions on forgiveness and mercy in earlier chapters, Levinas sees the concept of forgiveness as a gift of grace, or as something with conditions attached, such as repentance. This will enable us to see whether a Levinasian interpretation of mercy and forgiveness is appropriate to justify a new paradigm or a new lens.

7.2 Levinas, forgiveness and a moment in time

There is a strong relationship between forgiveness and time in Levinas' writings. In *Totality and Infinity*, Levinas describes his view in the following way:

pardon refers to the instant elapsed... it permits the subject who had committed himself in a past instant to be as though that instant had not passed on as though he had not committed himself. Active in a stronger sense than forgetting, which does not concern the reality of the event forgotten, pardon acts upon the past, somehow repeats the event, purifying it. But in addition, forgetting nullifies the relation with the past, whereas pardon conserves the past pardoned in the purified present. The pardoned being is not the innocent being.³⁹⁰

It is an exposed or suspended present, namely a present that assumes nothing more than my need in the here and now to seek forgiveness.

in the I and Totality Levinas says that what makes possible the act of forgiveness is firstly the recognition of the fault and secondly the recognition of the unjustifiability of the fault itself is what lies totally beyond the logic of justification and of justice.³⁹¹

Ponzio argues that in fact the appearance of the third needs not to overcome forgiveness or the ethical relation with the other.

In an article discussing both Arendt and Levinas on forgiveness, Christopher Allers

³⁹⁰ Emmanuel Levinas cited in Christopher Allers 'Undoing What Has Been Done: Levinas and Arendt on Forgiveness in Perspective' (eds. Christopher Allers and Marieke Smit, Rodopi, 2010) p.7.

³⁹¹ Julia Ponzio 'Politics Not Left to Itself: Recognition and Forgiveness in Levinas' Philosophy' (eds. Marinos Diamantides, M., *Levinas, Law, Politics*, (Routledge Cavendish 2009) p.41.

describes forgiveness as undoing a misdeed by reversing time, acting on the misdeed and making as though it did not happen. A new beginning takes place. In forgiveness, we are reversing the irreversible. In the *Human Condition*, Arendt famously sees forgiveness as a release, an unbinding of an agent from the consequences of an action. In order to do this, however, the act must be undone – this would be impossible and miraculous. In this way, Arendt echoes Derrida's notion of it only being possible to forgive what is unforgivable. We are forgiving for the sake of the person who is in need of forgiveness. Allers³⁹² takes issue with Arendt on this point, stating that if the act is to be undone, this would mean that the offender was innocent and therefore there would be no need for forgiveness in the first place. I will not engage with Arendt in detail here, other than to note her similarity to Levinas' position.

Levinas treats this slightly differently:

forgiveness is a reversing of time and an acting upon the past that makes as if the event never happened, as if the deed had not been done, as if the doer had not done the deed.³⁹³

However, for Levinas, the past can be retold, but it does not change.

in a word, forgiveness is not only concerned with one's flesh and blood child, but with one's own rebirth. When someone forgives an offender, the offender is given a new birth in the eyes of the forgiver. Forgiveness is the 'very work of time'.³⁹⁴

In this way, forgiveness acts against the natural order of things in that it seeks to reverse time. A distinction must be drawn between forgiving and remembering – in remembrance we are bringing time forward; but in forgiveness we can act as if it had not happened:

in forgiveness, what was done in the past is 'undone', not in some metaphysical sense in which one literally or physically changes the past but for Levinas, the past is

³⁹² Christopher Allers 'Undoing What Has Been Done: Levinas and Arendt on Forgiveness in Perspective' (eds.) Christopher Allers and Marieke Smit, (Rodopi, 2010), p.7.

³⁹³ Christopher Allers 'Undoing What Has Been Done: Levinas and Arendt on Forgiveness in Perspective' (eds.) Christopher Allers and Marieke Smit, (Rodopi, 2010), p.7.

³⁹⁴ Christopher Allers 'Undoing What Has Been Done: Levinas and Arendt on Forgiveness in Perspective' (eds.) Christopher Allers and Marieke Smit, (Rodopi, 2010), p.7.

undone in a purely ethico-phenomenological sense.... Historically the deed was done, but ethically it is as if it had not been done.³⁹⁵

In a sense, the past event is cleansed and purified, since forgiveness is a rigorous ethical event. So, forgiveness is the gift of time and the offender is released from what he or she did and has the gift of a new beginning. It permits the subject who has committed himself in a past instant to be as though that instant had not passed. In Levinas' discourse, therefore, forgiveness is crucially placed at this very important moment - that of the passage from the ethical experience to that of justice.

Whilst the political subject may act in a certain way according to social and political norms and influences, the ethical subject does only one thing, acts ethically. Norrie argues that the abstract legal individual has not been considered according to their upbringing or other personal circumstances; there is still an exchange or a calculation involved. For Levinas, though, that space must include forgiveness.

In this way, we can say that Levinasian thought supports forgiveness and pardon. Most importantly, for our purposes here, if the idea of Levinasian forgiveness or pardon is that it 'wipes out the past', then this has important implications for our use of forgiveness. First of all, it would enable us to disagree with both Griswold's and Murphy's assertions that in order to forgive we must repent. It would take us further than the restorative justice, in that for example, in reintegrative shaming, an acknowledgement must take place. It wipes out the deed in the first place. As Meyer says, the 'memory of the wrong as wrong' is no longer necessary.

It is important in this regard to return to some of the problems raised in Chapter 2, when we began to look at some definitions and limitations of forgiveness. One of those issues was to ask whether forgiveness must have conditions attached to it, in particular, the condition of repentance. According to Levinas, forgiveness 'erases' time ethically. Linda Ross Meyer asserts that the offender and victim are thrown together, and to require repentance is to ask the offender to be in a demeaning position.

³⁹⁵ Christopher Allers 'Undoing What Has Been Done: Levinas and Arendt on Forgiveness in Perspective' (eds.) Christopher Allers and Marieke Smit, (Rodopi, 2010), p.7.

7.3 Settlement, trauma and being-with-others

Meyer's central argument, introduced in Chapter 4, is that mercy and forgiveness are only excluded from the criminal justice system, are beside the system, if reason is taken as the 'glue' of community. In other words, mercy is disliked in Western systems of law and punishment because it is an irrational emotion, either on the part of a judge, or on the part of a victim, who wishes to forgive one who has harmed her.

Instead, the philosophy of Levinas, and Heidegger can be used to justify a vision of criminal punishment which instead views the offender and victim as 'thrown together' to 'be-with' each other. In order to allow this to happen, a 'risk' must be taken by the offender, by the victim and by the community.

A sentence imposed by a court is seen in a different way. Instead of having pure punishment or retributive qualities, it is instead seen as 'the saying of a settlement' or the 'saying of sense again in the world'. This sounds much more like a restorative process in which there is some reconciliation between the offender and the offended against. Furthermore, this 'settlement' can be seen as a form of sacrifice. It is not quite clear what this sacrifice is. In taking the step to trust, we are allowing the future to reach a conclusion. In allowing mercy to become part of punishment, we are ending the reverberations of a wrong.

Meyer emphasises that mercy in this analysis is a sort of grace, rather than an exchange; being allowed in this way, mercy is a sort of compassion:

primal mercy or grace comes to appearance in punishment then in its more familiar guise as compassion, an awareness, an experience and an articulation of our mutual reliance and vulnerability.³⁹⁶

Meyer also deals with remorse. This takes us back to Chapter 2 and a consideration of whether forgiveness, in this analysis requires anything to be given in return. The conclusion she reaches, similar to what she claims above, is that it must take place in the form of grace.

³⁹⁶ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.86.

Mercy, in its truest form, does away with remorse:

mercy cuts off the infinite rebite of remorse and the infinite causal chain of responsibility or vengeance that would otherwise be ours and that would make any act as a true beginning impossible.³⁹⁷

In this way, mercy provides a solution or an end to the 'narrative of wrong'.

Meyer, thus, provides a full critique of desert; in punishing the offender as he deserves, we are reducing the other to a criminal, and at the same time, we are reducing the victim to the status of one who suffers. By introducing mercy, we are not presuming to know what is deserved and instead we are treating the offender with dignity. This opens up the possibility of a future, rather than the backward looking of retributive theory.

Instead of the adversarial system that pits victim and offender against one another, punishment is seen as the 'shared memory of the wrong as wrong'³⁹⁸. This is the idea that the defendant and the victim are thrown together to feel a mutual trauma. Mercy allows both parties to see things more clearly, for the offender to understand the victim's trauma, and for the victim to understand the offender's. Ideally, the role of the judge (or facilitator/mediator) in a restorative justice setting, is to witness this event. It enables them 'to feel the pain of separation from the other' and to restore the part of the self that is itself only in relation to the other. This is essential, if we are not to be caught in a vicious circle of revenge:

we have to keep trying to come to a place of mutual understanding of the wrong as wrong, or we fail to fully appreciate its dimensions, its seductive powers, and the extent to which it continues to exist and implicate us.³⁹⁹

It is important to remember here that both parties experience the wrong as wrong, but there is an important result for the offender. Experiencing the wrong as wrong will move the offender to remorse. However, it is better that we do not expect this, or certainly not as a condition for mercy. In this way, the sublimity of the offender is respected. In response to the point also made in Chapter 3 that some crimes cannot be

³⁹⁷ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.87.

³⁹⁸ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.87.

³⁹⁹ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.92.

forgiven, Meyer offers the following analysis. It is wrong to make an absolute judgment, and assume that the moral status of an offender at a particular point in time is a snapshot of the way he will be for the rest of his life. We do not have the right, according to Meyer, to make this sort of absolute judgment. To do so is to avoid the risk of forgiveness and mercy. On this point, she returns to the idea of dignity stating that 'the sublime in the other is the Levinasian interpretation of Kantian dignity'. This also is a point to return to in our discussion of uBuntu philosophy. Dignity can also be aligned to Murphy's definition of self-respect.

a key objection to forgiveness is that in order to be possible at all, there must be repentance or apology. Without it, mercy is impossible. However, with an alternative lens of punishment as settlement, in which the victim and the offender come together, there is not a single person or body deciding whether the offender has received his just deserts, with no hope of redemption. Instead we can still acknowledge the hurt done to the victim without making a lifelong decision about the offender's desert. This links to the risk that the community takes in deciding to offer mercy to the offender. In this way, mercy means being willing to live in moral uncertainty in some, maybe many cases.⁴⁰⁰

Meyer makes an important intervention regarding the role of the judge. A classic objection to forgiveness or mercy made by a judge is that only the victim has 'standing' to forgive. This point is explored by Murphy and was discussed in Chapter 3. Meyer's response to this is to argue that mercy can be extended by anyone who has witnessed the wrong as wrong and will accept the sacrifice offered. It might be argued of course that the judge in this situation is not taking a risk. This can be seen differently, if the judge is seen as acting on behalf of the whole community.⁴⁰¹

In practical terms, she recommends a determinate sentencing system. This removes the uncertainty of the sentence being reduced when the defendant shows remorse, and with it the sense of indignity that the defendant is forced to 'grovel before an authority figure, who may or who may not be a compassionate judge'⁴⁰². In this way, if we 'sentenced with more humility, we would sentence with less indignity'.⁴⁰³

⁴⁰⁰ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.87.

⁴⁰¹ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.89.

⁴⁰² Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.89.

⁴⁰³ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.89.

Mandatory sentencing is not the answer either; not because it would not work per se but because of the way it is currently used:

far from recognizing the tragic and sublime unknowable in offenders, mandatory sentencing as we practice it degrades and denigrates them.⁴⁰⁴

We considered this issue in Chapter 6, in the reverse. Acorn argued that offenders degraded victims by lying about their wish to be remorseful, and thus retained their power over them. The only way for both the offender and the victim to achieve satisfaction in a criminal case is for them to face one another. The offender thus has the opportunity to apologise, while the victim needs to see the offender's face to stop being afraid⁴⁰⁵.

I am not sure that it is true that remorse is not possible for true forgiveness or mercy to take place. It may be that mercy and forgiveness can still take place even with the remorse of the offender. She argues that what mercy does is to give some sense to the story. This can be achieved where both the offender and the victim are given a voice. This can be observed both in the quasi-legal context of the Truth and Reconciliation Commission, and in the narratives offered by the Forgiveness Project. Both of these contexts will be explored below as an alternative to Meyer's proposal. What both of these examples offer are real situations where forgiveness and mercy have worked in reality. It remains for the law to acknowledge that such moves do exist. Furthermore, where these initiatives differ from Meyer furthermore is in an acknowledgement of the interrelatedness of victim and offender.

On dignity, I find that there is a contradiction in Meyer's thinking. The Kantian notion of the autonomous legal individual that is respected by the law is not something which Meyer seeks to maintain. Instead, she seeks an alternative lens. The individual who commits crime is respected in the sense that, he has a right to punishment. As we shall see later in this chapter, it is possible to feel both the call to the other, and retain the particularity or singularity, which creates dignity and right.

⁴⁰⁴ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.94.

⁴⁰⁵ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.115.

In sum, Meyer believes that instead of inflicting pain in the form of prison time, punishment should become a 'shared memory of the wrong as wrong'⁴⁰⁶. The offender will feel remorse, the victim will not feel fear. If testimony is offered instead of punishment in the traditional sense, then the offender and the victim are reunited. This may be through confession or testimony. A settlement is achieved in the sense of a reunion, to which mercy is integral. We are moving away therefore, from the assumption that a sentence is only effective, if it is a harsh one.

The current system of pardons does not work, as there will always be a need for more and more pardons. The only way to achieve an equitable result through pardon is to keep this rule-less:

the demands of equity can never be satisfied once and for all, for life, law and knowledge of the world are moving targets.⁴⁰⁷

According to Meyer's analysis, the only way to achieve 'peace' after a criminal encounter is through the 'face to face encounter' with the one who has caused harm. In this way, there is an ethical encounter.

It is, for Meyer, a matter of perspective. In military trials, for example there is a trust within the military community. Transgressions are taken to be just that and treated as human tragedy, rather than producing inhuman monsters⁴⁰⁸:

Part of the 'risk' is taken up by the community – that is, the military community:

the forgiveness we may offer in these cases is the settlement made with a community that cannot ignore the fact that these crimes were committed by citizens of honour whom the community itself trained to be obdurately indifferent so they could kill.⁴⁰⁹

Retributivism protects the offender and treats similar cases alike. It does however keep mercy at the sidelines on the grounds of its inequality. This, according to Meyer, is a mistake. It ignores the nature of being human, and is based on a misunderstanding that reason is the glue of community and the ground for community responsibility.

⁴⁰⁶ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.100.

⁴⁰⁷ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.159.

⁴⁰⁸ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.158.

⁴⁰⁹ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.159.

The perfect system of retributive justice is unattainable, as no individual case fits into the retributive ideal. Case law is already inconsistent. The answer is instead to treat punishment as the feeling of remorse which the offender will experience when faced with the pain of the victim. Both parties will share a memory of the wrong as wrong, rather than going through and experiencing a faceless and unilateral decision on the part of a judge (who has not been wronged) to punish. Instead, that judge is a witness to this face-to-face encounter, which is known as a merciful settlement. Meyer's analysis closely resembles the stated aims of the restorative justice process. It does not specifically allow for the emotions to be incorporated. The philosophy of uBuntu holds more promise as a paradigm for allowing forgiveness and mercy to flourish in criminal law and punishment.

I have shown how Linda Meyer suggests that if we do not take Kantian reason and autonomy as the ground for morality and community, then forgiveness and mercy become possible. She suggests that an alternative approach may be to conceptualise the criminal subject differently, which would enable him to be seen as *already connected to others*. This is the Heideggerean/Levinasian idea of the face or being-with-others. In fact, I will argue that what may be involved is more than a being-with-others, but a practical ethical call to others, which moves beyond the communitarian approach favoured by Meyer.

One example of this philosophical stance is the African philosophy of uBuntu. This is generally contrasted with the Kantian approach. However, as we shall see, this is not a communitarian approach, which compromises the individual's dignity and singularity. uBuntu is based on a different understanding of dignity to the Kantian schema, but somehow manages to respect community and individual dignity in the same philosophy. I will show how this philosophy can, along with the emotions, inform our understanding of forgiveness and mercy, and allow it to be taken into consideration. uBuntu sees the subject in a different way. Unlike Kant, it does not conceive of the individual subject as simply agreeing to a social contract. In the West we might talk of 'I think therefore I am', whereas the uBuntu version would be translated as 'I am human because I belong'. Thus uBuntu can be seen as a radical reflection of our humanity, yet it also has the universal appeal of traditional community values:

while the connectedness of all human beings beyond such differences as race, ethnicity, gender, or religion is central to the application of uBuntu in practice, it also acknowledges the importance of their individuality and independent identity. This is not in the Cartesian or modernist sense of the atomistic self which seem to exaggerate solitary aspects of the human.⁴¹⁰

The legal status of uBuntu might be aligned to equity. Unlike equity, it has been used directly in both the substantive, constitutional and procedural law in South Africa. It was referred to in the Constitution and used, if not explicitly, at least, implicitly, in the Truth and Reconciliation Commission, and in cases and legislation since then. In this way, then, it is different to equitable principles.

In the following section, I will explore the philosophical basis for uBuntu, drawing particularly on the work of the Truth and Reconciliation Commission and Drucilla Cornell's work on dignity and constitutional transformation. Cornell's seminal book *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* presents a finely nuanced argument on the move from the dictatorial regime of apartheid, to a form of democracy. This, of course, has its own struggles, and is outside the scope of this thesis. I will engage, however, with certain aspects of Cornell's thoughts on dignity, as these will be relevant to how an alternative paradigm of criminal justice might benefit from the South African experience of incorporating the equity-like principle of uBuntu into its jurisprudence and philosophy.

In doing so, I will argue that the South African experience shows that it is possible to view the subject (the criminal subject, for the purposes of this thesis) in a different way. If this is done, as Meyer argues, acknowledging forgiveness becomes possible, in both the public and the private spheres. I will explain some of the key differences between an uBuntu philosophy and one which is based on retributivism before proceeding to show that it is possible for an alternative philosophy to work alongside the strictures of the law. I will deal with some criticisms of this approach, including one I anticipate for this thesis, and with which Cornell also engages with: the charge that uBuntu can have limited or no application outside the context of African politics.

⁴¹⁰ John Hailey uBuntu: A Literature Review – A Report Prepared for the Tutu Foundation (2008) www.tutufoundationuk.org/documents/uBuntu-literaturereview.pdf accessed 10 August 2014.

I will start by examining the philosophy in greater depth, and compare it to the retributive idea, before analyzing how it might inform a theory which would allow judges to make merciful judgments, and allow victims to have a (forgiving) voice. In doing so, I will argue that a philosophy based on uBuntu and an interconnected subject is more convincing than Meyer's suggestion of being-with-others – not least, because it can be shown to work in actual criminal cases.

On December 10th, 2013, President Obama referred to the word uBuntu in his address at Nelson Mandela's funeral

there is a word in South Africa- uBuntu - that describes his greatest gift: his recognition that we are all bound together in ways that can be invisible to the eye; that there is a oneness to humanity; that we achieve ourselves by sharing ourselves with others, and caring for those around us. We can never know how much of this was innate in him, or how much of was shaped and burnished in a dark, solitary cell. But we remember the gestures, large and small - introducing his jailors as honoured guests at his inauguration; taking the pitch in a Springbok uniform; turning his family's heartbreak into a call to confront HIV/AIDS - that revealed the depth of his empathy and understanding. He not only embodied uBuntu; he taught millions to find that truth within themselves. It took a man like Madiba to free not just the prisoner, but the jailor as well; to show that you must trust others so that they may trust you; to teach that reconciliation is not a matter of ignoring a cruel past, but a means of confronting it with inclusion, generosity and truth. He changed laws, but also hearts.⁴¹¹

uBuntu, then, can be described as an approach to human relations, which seeks to recognise that we, as individuals, are bound to one another. What most writers seem to agree on is the difficulty of defining it. It is, as stated by more than one writer, something that you will recognise when you see it.⁴¹² The significance of Obama's phrasing, for our purposes, is the comment on freedom for the jailor, as well as, the prisoner. Forgiveness affords both parties relief.

For Anderson⁴¹³, uBuntu (a Zulu word) is a lifestyle or unifying world-view (or philosophy) of African societies based on respect and understanding between

⁴¹¹ Remarks by President Obama at Memorial Service for Former South African President Nelson Mandela <http://www.whitehouse.gov/the-press-office/2013/12/10/remarks-president-obama-memorial-service-former-south-african-president-> (10 December, 2013) accessed 3 August 2014.

⁴¹² A Anderson Restorative Justice, the African Philosophy of uBuntu and the Diversion of Criminal Prosecution, <<http://www.isrcl.org/Papers/Anderson.pdf>> accessed May 2014, p.3.

⁴¹³ A Anderson Restorative Justice, the African Philosophy of uBuntu and the Diversion of Criminal Prosecution, <<http://www.isrcl.org/Papers/Anderson.pdf>> accessed May 2014, p.3.

individuals. uBuntu has been translated as 'humaneness', and is derived from the expression: *umuntu ngumuntu ngabantu* (a person is a person because of other people). It envelops values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity. Bennett notes that uBuntu first appeared in the law of South Africa in the judgment of *Mokgoro J in S v Makwanyane*⁴¹⁴:

metaphorically, it expresses itself in *umuntu ngumuntu ngabantu* describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation.⁴¹⁵

Justice Langa continued along the same lines:

it is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person's status as a human being entitled to unconditional respect, dignity, value and acceptance from other members of the community that such a person happens to be part of. It also entails the converse however. The person has a corresponding duty to give the same respect dignity value and acceptance to each member of that community. More importantly it regulated the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.⁴¹⁶

In his book *No Future Without Forgiveness*, Bishop Desmond Tutu summarises uBuntu in the following way:

it is the essence of being human. It speaks of the fact that my humanity is caught up and is inextricably bound up in yours. I am human because I belong. It speaks about wholeness, it speaks about compassion. A person with uBuntu is welcoming, hospitable, warm and generous, willing to share. Such people are open and available to others, willing to be vulnerable, affirming of others, do not feel threatened that others are able and good, for they have a proper self-assurance that comes from knowing that they belong in a greater whole. They know that they are diminished when others are humiliated, diminished when others are oppressed, diminished when others are treated as if they were less than who they are. The quality of uBuntu gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanize them.⁴¹⁷

⁴¹⁴ [1995] 3 SA 391.

⁴¹⁵ [1995] 3 SA 391 para 224.

⁴¹⁶ [1995] 3 SA 391 para 224.

⁴¹⁷ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) p.35.

And according to Justice Yvonne Mokgoro

in one's own experience, uBuntu it seems, is one of those things that you recognise when you see it.⁴¹⁸

The significance of uBuntu and how it can permeate everyday lives can be illustrated with an explanation of Professor Cornell's uBuntu Project which carried out interviews with young people in urban areas in order to explore the significance of uBuntu in their everyday lives.⁴¹⁹

Perhaps the best description is the one available on the website of the project:

In South Africa, the culture of uBuntu is the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. uBuntu speaks to our interconnectedness, our common humanity and the responsibility to each that flows from that connection.⁴²⁰

Adding an important caveat, Cornell calls uBuntu an 'activist ethic of virtue'⁴²¹. This emphasises the point that it is not about the saying, but about the doing. There is a 'profound ethical call'⁴²² to do something practical. This idea is echoed in the work of the Forgiveness Project. It is also important to note that uBuntu should not, simply because it is not retributive, be confused with a communitarian philosophy. It speaks of the interconnected subject, but also allows this subject to maintain his or her singularity. From this perspective, it is very interesting for this debate, since I am suggesting that elements of both philosophies can be used in incorporating forgiveness into legal processes. Cornell demonstrates that there is an erroneous assumption when discussing uBuntu, which is that an alternative philosophy or view of the subject must be in complete opposition to retributive theory. It may be that there are elements of both philosophies, and that an offender may be given the

⁴¹⁸ Professor Yvonne Mokgoro is a former justice of the Constitutional Court of South Africa. She was appointed to the bench in 1994 by Nelson Mandela. Mokgoro is a board member of the Centre for Human Rights at the University of Pretoria and is the current Chairperson of the South African Law Reform Commission.

⁴¹⁹ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.13.

⁴²⁰ *Dikoko v Mokhatla* [2006] SA235 <<http://www.theubuntuproject.org/WHAT-IS-uBUNTU>> accessed 10 August 2014.

⁴²¹ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.40.

⁴²² Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.40.

punishment he deserves according to retributive theory, but that some of the practices used may be drawn from an understanding that he is human, and connected to others. Cornell shows that in fact uBuntu philosophy, and the underlying theory of the Truth and Reconciliation Commission, drew on both. There are aspects of Kantian morality, and therefore law in uBuntu. This is particularly evident when we discuss the idea of dignity accorded to an individual human being, whether an offender or a victim. As Cornell states:

uBuntu is an activist virtue in which an ethical principle of humanness is brought into being and embodied in day-to-day relations of mutual support. It is not a contractual ethic in which self-interested individuals arrive at an agreement which is to their mutual advantage. Rather, the fundamental idea is that each one of us must initiate ethical action in the concrete situation before us, so as to bring about relations with other people that will underscore our common ethical commitments, thus providing support for networks of obligations, without which human beings cannot survive. The unsaid argument here is that uBuntu is not just an ethical ontology of a shared world, but is an ethical demand to bring about a shared world. uBuntu is a demand for the actual experience of building, enhancing, and at times repairing the moral framework of any particular framework of obligation.⁴²³

The second assumption is that Western societies cannot learn from an alternative philosophy such as uBuntu. Cornell thinks that this is not an entirely inappropriate response. In response to the charge that the philosophy of uBuntu was only appropriate given the very particular circumstances of the Commission, she cites a bold view that, in fact, Western 'modern' cultures can learn from Southern systems:

what if we posit that, in the present moment, it is the global south that affords privileged insight into the workings of the world at large? That it is from here that our empirical grasp of its lineaments, and our theory work in accounting for them, is and ought to be coming, at least in significant part?⁴²⁴

The legal status of uBuntu is often under question. It is important to understand that uBuntu is an ethical state; not just a different ontology but an ethical demand to bring about a shared state.

⁴²³ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.88.

⁴²⁴ Jean and John Comaroff, cited in Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.18.

This may create problems in its relationship with law, as it is an ethical state and not a legal one:

uBuntu is an explicitly ethical value and ideal, and therefore rejects any neat separation between law and ethics.⁴²⁵

Cornell discusses how this may challenge the notion of justiciability in an essentially positive system of law. It seems, however, that uBuntu is so incorporated that it is hard to see the difference. This might be compared to the development of equity in Western law.

It is also important to understand that uBuntu was not based on the social contract or on any understanding of law 'rooted in the State'⁴²⁶ but was based instead in customary laws. However, the principles of uBuntu were not confined to customary law but enshrined in the 'new' South African Constitution, and as we shall see, subsequently in domestic substantive law. Therefore, compared to the practices of restorative justice practices, it is of far greater significance:

uBuntu is not simply a value or ideal to be applied in the customary courts, it has become a justiciable principle at the level of constitutional law.⁴²⁷

Consequently, and for the purposes of this thesis, it stands as a useful example of how an alternative philosophy has been used in both the substantive and the procedural law, as well as, famously in the Truth and Reconciliation Commission in post-apartheid times.

The arguments for political amnesty and the setting of the Truth and Reconciliation Commission in depth are not within the scope of this thesis. Neither do I intend to deal in depth with the many issues of international law, or the questions of the status of the Truth and Reconciliation Commission. In that context Drucilla Cornell's work in this area is exemplary, and I will instead draw on the aspects of the Commission

⁴²⁵ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.13.

⁴²⁶ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.13.

⁴²⁷ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.13.

which philosophized on the nature of uBuntu. I am interested in how the philosophy of uBuntu was entwined in a legal or quasi-legal process. In this way, we can begin to see that forgiveness and mercy were possible in this dynamic. This is not to say that the revolution in post-apartheid South Africa cannot be relevant to this discussion. One of the issues, which the makes of the new Constitution had to consider, was of course the basis of the newly founded democracy.

the creation of a possibility of an ethical relationship between human beings, institutionalized by law, which would end the exclusion, the subordination and the exploitation of the black population, was the dream⁴²⁸ of the Freedom Charter.⁴²⁹

It is this ethical transformation, enshrined in law, which interests us here.

Having characterized uBuntu as an ethic and not as a system of laws, it is important in the context of this argument to decide which aspects of it might be able to inform a paradigm of forgiveness and mercy. It is crucial, however, at this point not to be too simplistic and to understand that it is not simply as Cornell suggests, a matter of replacing one philosophy with another. It may be, as with forgiveness itself, that a process is involved in which we try to incorporate the best of both worlds:

there has to be a critical engagement between these philosophical traditions... in that we need to see how the relations between the developments of the strands of critical theory both build off and sometimes limit one another.⁴³⁰

This would appear to work both ways, even if not starting from the same footing. African philosophy has long been engaging with European philosophy, but as Cornell points out, it has been challenging for South Africa itself to incorporate an indigenous aspect such as uBuntu into a positive legal construct such as the Constitution, and the same challenges would ensue should ideals of uBuntu be an inspiration for European positive law. This is a possibility, as Cornell suggests, drawing on the work of John and Jean Comaroff when she states that ‘many questions raised in the Global South

⁴²⁸ The Freedom Charter, 1955, <http://senc.ukzn.ac.za/doc/HIST/freedomchart/freedomch.html> accessed 10 July 2014.

⁴²⁹ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.13.

⁴³⁰ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.13.

are now the central questions which critical theory has to engage everywhere'.⁴³¹

We are then in a position to ask whether at some level, the quasi-equitable principle of uBuntu can inform a re-evaluation of the criminal subject, thus allowing mercy and forgiveness. uBuntu is not based on the social contract, but as we saw earlier on a conception of the subject (including the criminal subject) as being interconnected.

This was clear, right from the earliest stage of democracy in South Africa.

note that we have already moved away from the model of the social contract. The Freedom Charter demands an end to subordination and exploitation, and these demands challenge even the most radical notions of the social contract.⁴³²

Instead what was created was, for Cornell 'a unique African version of the Rechtsaat'.⁴³³ It included formal and non-formal types of law, including indigenous ones, such as uBuntu⁴³⁴. Characterising uBuntu as indigenous is according to Cornell incorrect as its very nature implies something quite opposite

uBuntu is not justified because it is Zulu or Tswana but because it provides us with an ethic of what it means to be an ethical human being. Therefore its justification does not lie in indigenous root.⁴³⁵

uBuntu reversed the usual trajectory of customary law being elevated to the status of the common law. Bennett suggests that instead of trying to define it as a concept we should consider the ways in which it has been used in practice. This of course is more useful to us in deciding how uBuntu might inform criminal justice policy.

An important feature of the contrast between retributive law and a legal system influenced by uBuntu is in the concept of dignity. We have seen how Murphy sees Kantian dignity as self-respect. Following his argument, a victim who forgives an

⁴³¹ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.8.

⁴³² Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.8.

⁴³³ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.9.

⁴³⁴ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.12.

⁴³⁵ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.13.

offender is lacking in dignity and self-respect. We will see how uBuntu manages to preserve the dignity and singularity of the individual without the need of the social contract.

The idea of uBuntu is not without its challenges. We saw in the introduction of this section that one of the criticisms of uBuntu is that it can be seen as an ethical system, rather than as a 'justiciable' element in a system of positivist law. This challenge can be answered in two ways. The first is that we can equate uBuntu to a system of equity. Cornell makes this point when she states that it is not intended to replace the law, and in any event, it may be that in the context of South Africa, we are not in any event dealing with the traditional *Rechtsstaat*. Likewise, as we have seen through Norrie, this perfect system of positive law does not exist in Western societies either. Quoting Mazrui, Mokgoro notes that the historical background of uBuntu allowed it to be developed and that we must guard against its use too readily. As stated above there were particular reasons for its development related to the nature of indigenous African societies. Mokgoro believes that room must be made for a juxtaposition of cultures. It may be that South Africa is uniquely made for such a juxtaposition but this does not mean that Western approaches to law and punishment could not learn from this philosophy, or at least, be informed by it when new policy is made or mooted.

Bennett states that it should not be considered as a rule or a principle. Instead it is a representation of the right way to live. It must play many different roles in society, thus it cannot be more precise. It is difficult to espouse the same principles where there is a written tradition of law, which must, by definition, be distanced from the speaker. Equity operates in the same way:

the parallels between uBuntu and equity are compelling....the latter allowed English judges discretion to work out fairer results in particular factual scenarios thereby serving as a counterweight to inflexible rules of the common law.⁴³⁶

Bennett points out however that equity was not adopted by the courts in apartheid South Africa. A second challenge to uBuntu as a whole and to any use of it in a Western legal system, is that it is particular to the special situation in which post-

⁴³⁶ T W Bennett 'An African Equity' http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/per_old/issuepages/2011volume14no4/2011x14x4uBuntoBennett.pdf accessed 2 May 2013 p. 351.

apartheid South Africa found itself. To counter this, Cornell states that it would also be a mistake to reduce it to indigenous values as it provides us with an understanding of what it means to be an ethical human being⁴³⁷. Cornell further notes that this approach might have enormous benefits for any ethical society. In terms of forgiveness and mercy, it is an example of how a compassionate approach can work, and can be used by the law. It is a 'high ethical endeavour'.⁴³⁸

One of the challenges for the new South African constitution was how to deal with transgressors of the apartheid era. Would amnesty be granted? If it were not, would a victim have the opportunity to seek redress through the civil and criminal courts? In the *Azapo* case⁴³⁹, the applicants unsuccessfully argued that the removal of civil and criminal liability from the Truth and Reconciliation Commission was unconstitutional and infringed their right of access to the courts. It was held that the Truth and Reconciliation Commission could grant conditional amnesty in certain circumstances and that this amnesty procedure had been specifically chosen since without it there would be no incentive for offenders to disclose the truth. Any decision to do so would bar a victim from exercising a further claim. The case arose from the decision to allow one of the committees of the Truth and Reconciliation Commission to grant amnesty. The Commission consisted of three separate committees: the Committee of Human Rights Violations, the Committee on Reparation and Rehabilitation and the Amnesty Committee. It was in relation to this last Committee that the Azanian Peoples Organisation (AZAPO) challenged the constitutionality of the Amnesty provision in the Promotion of National Unity and Reconciliation Act (which gave birth to the Commission).

There were many constitutional and international legal reasons for this decision and in the arguments in support of the claim. The losses suffered could never be repaired in the civil courts, and no redress could be obtained through the criminal ones. The situation in post apartheid South Africa is an extreme example of how neither victim

⁴³⁷ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham, 2014) p.13.

⁴³⁸ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham, 2014) p.13.

⁴³⁹ *AZAPO and Others v President of the Republic of South Africa* 1996 4 SA 671.

nor perpetrator could be satisfied with the outcome of an adversarial trial, and which we discussed in Chapters 1 and 2. The point was a forward-looking solution:

if the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others, It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, uBuntu over victimisation.⁴⁴⁰

The ‘deeper point’⁴⁴¹ is that the judges always reverted to uBuntu. Cornell states that she has changed her mind on the effect of such a decision – originally holding that the decision was wrong, since it did not take into account the international legal doctrine of criminal prosecution that was available after the atrocities. However the two overriding ideals of the TRC and then the Constitution, uBuntu and dignity, have now convinced her that the loss of further legal redress is appropriate. This demonstrates that principles, such as uBuntu can be successfully incorporated into a legal system. If we were to do the same with compassion, or even mercy and forgiveness, it would enable judges not to feel constrained by strict legal concepts. She argues that she has come to understand that constitutionalism in South Africa must be understood against a background of uBuntu. Cornell argues that there are two strands to the development of the constitution in South Africa – uBuntu and dignity. I will argue that these have particular significance in our discussion of locating forgiveness in the criminal justice system. I have shown in earlier chapters that the Kantian criminal law cannot envisage forgiveness due to the need for individual autonomy and self-respect. We discussed the view of Jeffrie Murphy, who holds that easy forgiveness means that the person proffering it does not respect himself, or indeed negates the offender’s entitlement to a just, deserved punishment.

Meyer has argued that the way to approach this is to adopt a philosophy of mercy, which is based on Levinas and Heidegger. Building on this analysis, but also adding to it, I will show, drawing on Cornell’s work on dignity, that in fact dignity and self-

⁴⁴⁰ [1996] 4 SA 671.

⁴⁴¹ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham, 2014) p.59.

respect is not lost in a restorative paradigm. Viewed in this way, compassion can be compatible with dignity and self-respect. If forgiveness is close to compassion, then forgiveness also has a close link with dignity.

Murphy argued that a victim who forgives loses dignity and self-respect. In the context of the TRC, opposers of the amnesty and those who found fault in the Azapo decision, held that amnesty respected neither the perpetrator nor the victim. The commentators also relied on Kant, who argues as we saw in Chapter 3, that retribution is the only theory of punishment consistent with respect to the dignity of all others. This includes respect for the perpetrator, of course. The implications, for Cornell, reach much further than the respect or dignity of the individual victim or perpetrator. By exacting retribution even after society has been dissolved (and executing the last murderer),

it would be the duty of the last man or woman after a dissolved social contract to enact retribution in the name of the rightfulness that might still be restored if the dignity of our humanity is respected.⁴⁴²

Cornell argues that the ethics of uBuntu was a better alternative. Firstly, she states that uBuntu holds that none of us is unique or able to be human without others. Secondly, that being human is in itself an ethical idea, and not just the fact that we are interconnected, but how we put this into practice in our daily lives. This is a two way process as others have obligations to us.⁴⁴³ In this way, it is not 'some ontological shared reality but something we struggle to bring about together'.⁴⁴⁴

This argument sounds remarkably similar to forgiveness, as a philosophical and practical inspiration for its application whether in the criminal trial or through other mechanisms. Forgiveness, too, is a process, which is hard to achieve.

Most importantly, it does not relinquish the possibility of individual rights. This is also true of forgiveness, which can take many different forms and processes. It is an

⁴⁴² Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.68.

⁴⁴³ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.69.

⁴⁴⁴ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.70.

act of repair, or as Sanders sees it as a 'mourning-with' or a type of reconciliation or condolence. This, I would argue, is a different experience of 'being-with' or sharing, to Meyer's notion that passes through mercy; it is in practical terms a sense of story telling, explaining, truth-telling. In this context, uBuntu theoretically approximates more forgiveness than Heidegger does, and offers a practical understanding of it. Cornell call this experience of condolence an 'ethical relationship of uBuntu that is not forsaken by the fact that one has been a beneficiary in apartheid'⁴⁴⁵. In a criminal trial, this is similar to the 'shared memory of wrong', but it goes beyond settlement, really encompassing the idea of uBuntu.

Cornell states that the TRC was unique in that:

it was rooted in an African ideal that urges all the participants and the population in general to move away from a more convenient and liberal notion of the individual person that is self-constituting and recognized in its individuality because of its self-constitution.⁴⁴⁶

The attitude of judges in the South African system see it as a given, not an extra. As Cornell points out, Justice Sachs has stated that without uBuntu, he 'would not have been able to resolve adequately the complex legal and institutional aspects involved in the case so as to justify overturning the eviction order'.⁴⁴⁷

uBuntu is, of course, a product of the development of customary law over many centuries and there is no intention here to 'apply' it to the law in the UK. In particular the jurisprudence in South Africa, in both substantive and procedural law, has had to develop against the backdrop of an oppressive regime and a long political struggle.

The constitutional, political and legal ramifications of this struggle are complicated and delicate, as Cornell explains. Nonetheless, uBuntu is also a way of living life, which is neither based on contractual considerations, nor on one individual's duty to

⁴⁴⁵ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.71.

⁴⁴⁶ Mark Sanders, *Ambiguities of Witnessing: Law and Literature at the Time of a Truth Commission* (Stanford 2007) cited in Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p. 50.

⁴⁴⁷ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.116.

another. It has elements of compassion, and as such it could inform a new theoretical understanding of forgiveness and mercy in criminal law.

Cornell shows that uBuntu was not used to its best effect in the 'new' constitution, being limited to a 'justification'⁴⁴⁸, rather than a core principle, stating that this has been criticised as it should, following Mokgoro's words, have underlain the whole Constitution. She shows that there is an overlap between uBuntu and dignity. This is not, however, similar to Kantian dignity that we could call 'self-respect dignity'. The difference is that Kantian dignity does so through the social contract, whereas uBuntu does so through the interconnected subject. The criticism of the background position given to uBuntu in the Constitution is that it de-Africanises the process. Cornell argues that dignity can be interpreted not in the Kantian sense, but following the ethics of uBuntu.

uBuntu, however is not simply an interconnectedness. It is an interconnectedness of singular subjects, that are not bound together in a 'kingdom of ends' in a social contract, but obligated to others, as others are obligated to us, but not necessarily to the community.⁴⁴⁹

we could say that a person is ethically entwined by others from the beginning. But this intertwinement does not define us or who we might become. Instead we must find a way in which to realize our singularity as a unique person. In that singularity we will become someone who will define our own ethical responsibilities as we grow into our personhood.⁴⁵⁰

⁴⁴⁸ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.121.

⁴⁴⁹ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.134.

⁴⁵⁰ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.135.

This idea is called, variously ‘participatory difference’⁴⁵¹ and ‘sympathetic impartiality’⁴⁵² and it is not the same as communitarianism in the Western sense. In this way, it is close to the idea of Levinas’ face. The latter term in particular requires us ‘not to seek likeness, but to imagine others in their difference from us and in their singularity’.⁴⁵³

This singularity would favour an approach, where the subject (for our purposes, the criminal subject) is respected and given dignity in his singularity. This might involve any circumstances, which would inspire compassion or forgiveness in a judge or a victim. It would also allow us to refrain from regarding the criminal subject in an abstract sense, thus counteracting the problems that we described in Alan Norrie’s argument in Chapter 4.

The idea of care or compassion and justice are integral to one another in uBuntu, whereas, in the Kantian schema they appear to be in opposition. However, I have argued in this thesis that these are already matters of the law already, and are not as opposed as they might otherwise appear. In the Kantian scheme, as we saw in Chapter 3, free will is only possible if we are independently autonomous. Cornell states:

it would no longer be a matter of thinking freedom either as the basis of an abstract morality...but instead as an activist ethic that can only be realized in and through ethical relations to other people.⁴⁵⁴

Cornell characterises uBuntu as a different way of thinking, positing that:

I am advocating... that we allow ourselves to engage with competing ideals of freedom, and indeed open ourselves to their significance.⁴⁵⁵

⁴⁵¹ D Masolo ‘Western and African Communitarianism: A Comparison’ in *A Companion to African Philosophy*, ed. Kwasi Wiredu cited in Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.135.

⁴⁵² Kwasi Wiredu, *Cultural Universals and Particulars: An African Perspective*, (Indiana University Press, Bloomington, 1996) referred to (not cited) in Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.59.

⁴⁵³ Kwasi Wiredu, *Cultural Universals and Particulars: An African Perspective*, (Indiana University Press, Bloomington, 1996) referred to (not cited) in Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.59.

⁴⁵⁴ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.139.

Writing on the 'difference that makes a difference'⁴⁵⁶ between dignity and uBuntu, she highlights that in cases in which uBuntu seems important, reconciliation takes precedence over money, and revenge.

The South African Constitution also embodied Kantianism, according to Cornell. The Kantian notion of dignity is rooted in the inseparability of law from morality, and that as reasonable creatures who come together in a community to form the kingdom of ends, we have a choice to exercise our practical reason and 'do the right thing' according to the categorical imperative. This is grounded in morality.

Because we are reasonable, it should not be too much of a leap to imagine that others will also be reasonable too:

the idea of humanity, famously presented as a formulation of the categorical imperative, is inseparable from the possibility that each of us can project our ends as a reasonable creature, who can promote a community in which mine harmonises with yours in the Kingdom of Ends....human beings have equal worth because we all have the possibility of guiding our actions through practical reason.....this equality, for obvious reasons, was key to the new South Africa, in order to enable a 'moral inversion of the dreadful history of apartheid.'⁴⁵⁷

It would ensure that dignity would not be lost again.

Thus, the way that Kant is read here aims at understanding the possibility of a kingdom of ends through the exercise of practical reason. This involves

harmonising our interests...for Kant, we represent the realm of external freedom through a hypothetical experiment of the imagination in which we configure the conditions of the social contract rooted in the respect for all the other human beings.⁴⁵⁸

⁴⁵⁵ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.147.

⁴⁵⁶ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.147.

⁴⁵⁷ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.153.

⁴⁵⁸ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.157.

This is a different approach to Kantian morality, which might inform our understanding and allow compassion and forgiveness as a form of dignity. This takes us back to Ross Meyer's interpretation of sense and settlement in which she insists that the offender is not forced to lose his dignity. Her interpretation is that it fails to account for those who cannot reason. Cornell holds that those who hail Kant as too individualistic have misread him, but concedes that Kantian philosophy it is nonetheless based on reason. This does not need to be the case, as Meyer argues. By contrast

uBuntu does not defend dignity through our capacity to reason and does not think that the social bond is an experiment that begins with imagined moral individuals.⁴⁵⁹

Cornell has explained that Ubuntu is both singularity and community, and that there is a process involved in becoming human that starts from the moment of the separation from the mother with the aid of the community. Each person has a unique destiny, but this cannot be achieved without the contribution of the individual to the community, and without the contribution of others to the community and to that person.⁴⁶⁰

At this point in Cornell's thinking, uBuntu, becomes extremely relevant to the criminal subject. This process of 'becoming human' involves the individual's duty towards others, and others' duty towards that individual. What becomes of the individual, the offender, the one who harms others in this scheme? Can he be forgiven for transgressions?

We have seen that Western thought on criminal law tends to treat the criminal subject as 'other', as morally irredeemable once a serious crime has been committed. We punish for the moral transgression and also for the harm that has been committed. Even in restorative justice, the emphasis is on the healing and restoration of the victim but rarely of the offender.

⁴⁵⁹ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.157.

⁴⁶⁰ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.158.

Can uBuntu offer us a different perspective on the criminal subject, as the one who is inextricably bound in others? The answer would seem to be positive:

a self-regarding or self interested human being is one that has not only fallen away from her sociality with others; she has lost touch with her humanity. One crucial aspect of doing justice to such a person is that we who are participating in an ethical community help that individual get back in touch with him or her-self... (a crime) is a violation of the individual's duty to himself, the duty to be a social human being.⁴⁶¹

This is a different understanding of dignity and resonates with Tutu's understanding of diminishing. Dignity is understood as the 'ethical core of relations of mutuality'⁴⁶²

Cornell's understanding of uBuntu is that it is not based entirely on the community but instead it must take into account of the participatory difference. In this way, it may embody elements of a Kantian philosophy. This approach offers a different understanding of compassion.

In her response to Cornell, Justice Yvonne Mokgoro:

the presence of uBuntu as a guiding norm in the interpretation of our basic law is essential for the legitimization of our legal system....we ignore uBuntu at our own peril.⁴⁶³

She also suggests that perhaps we do not need to try so hard to reconcile the two notions of dignity and uBuntu. Could the same be said for compassion and forgiveness?

We saw above that the makers of the Constitution in the new South Africa were keen to avoid an overarching retributive approach to perpetrators of atrocities during the apartheid era. This approach has also permeated the substantive law. We discussed the use of mercy as compassion and mercy as defence, earlier in this thesis, and it is interesting to note a different approach in use by the South African courts.

⁴⁶¹ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.162.

⁴⁶² Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.163.

⁴⁶³ Yvonne Mokgoro 'Where Dignity Ends and uBuntu Begins: A Response by Yvonne Mokgoro and Stu Woolman' in Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.153.

An even more decisive goal of restorative justice appears in the Child Justice Act⁴⁶⁴. In the 'Aims' part of this enactment, a declaration is made to 'expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed'. Thereafter reconciliation and restorative justice appear frequently, as for instance, in the 'objects of the act' and the policy of diverting juvenile offenders from the penal system.

uBuntu has made only a brief appearance in the substantive criminal law. *S v Mandela* involved a plea of compulsion. The accused, however, could prove no immediacy of life-threatening compulsion. The court held that, if lower standards were accepted for this defence, too little would be required of people who now live in a society based on freedom, dignity, uBuntu and respect for life. It was implicit in the idea of uBuntu that every person deserved equal concern and respect.⁴⁶⁵

In terms of the substantive criminal law, Bennett notes that where the courts have made reference to uBuntu in the context of substantive criminal law, it has been to emphasise duty rather than responsibility. In *S v Mandela*⁴⁶⁶ the defence of compulsion was raised and rejected on the ground that to lower the standard for this defence meant that too little responsibility would be placed on individuals who live in as community in the spirit of uBuntu and little respect for life. It was implicit in the idea of uBuntu that every person deserved equal concern and respect.⁴⁶⁷

Bennett further notes that concepts such as hospitality, trust, fairness and civility emerge in turn form the concept of uBuntu. These notions have been applied in such far-reaching areas of law as unfair discrimination cases, refugee law:

civility is more than just courtesy or good manners... it presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute. In this sense, civility was connected to uBuntu, and was said to be deeply rooted in traditional culture and widely supported as a precondition for the good functioning of contemporary democratic societies.⁴⁶⁸

⁴⁶⁴ Child Justice Act 2008 (No. 75 of 2008).

⁴⁶⁵ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) p.35.

⁴⁶⁶ *AZAPO and Others v President of the Republic of South Africa* 1996 4 SA 671.

⁴⁶⁷ T W Bennett 'uBuntu: An African Equity' http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/per_old/issuepages/2011volume14no4/2011x14x4UubuntuBennett.pdf accessed 2 May 2013 p. 351.

⁴⁶⁸ T W Bennett 'uBuntu: An African Equity' http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/per_old/issuepages/2011volume14no4/2011x14x4UubuntuBennett.pdf accessed 2 May 2013 p. 351.

Furthermore, the courts have encouraged government bodies in the interpretation of statutory provisions to move beyond the common law conception of rights as strict boundaries of individual entitlement.

The use of uBuntu in decisions of the South African ties is not closed, according to Bennett, and for this reason is developing into something akin to equity in Western law. It is deeply embedded in cultural, and courts must recognize it:

the notion of participatory democracy is also an African one. Victim participation was the norm in deciding the proper 'punishment' for offenders in traditional African society...this remarkable tradition of participation and capacity for forgiveness in African society also underlay at a deeper level, the amnesty process.⁴⁶⁹

In the law of property, uBuntu has been used to address the rights of the homeless and those forced to seek shelter on property owned by another. The court must consider broader constitutional values, such as justice, equity, fairness and compassion in conjunction with the broader structures of the law. Bennett cites Sachs J in this regard:

[The court is required] to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern....we are not islands unto ourselves. The spirit of uBuntu, part of the deep cultural heritage of the majority of the population suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights which is nothing if not a structured, institutionalized and operational declaration in our evolving society of the need for human interdependence, respect and concern.⁴⁷⁰

In a defamation case, *Dikoko v Mokhatia*⁴⁷¹, uBuntu played a significant role. Here Mogkoro J held that monetary compensation for defamation was not entirely appropriate to restoring reputation and that the aim of the court should be to re-establish a respectful relationship between the parties. Apology was recommended

⁴⁶⁹ Albutt v Centre for the Study of Violence and Reconciliation cited in T W Bennett 'uBuntu: An African Equity' http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per_old/issuepages/2011volume14no4/2011x14x4UubuntuBennett.pdf accessed 2 May 2013 p.40.

⁴⁷⁰ Albutt v Centre for the Study of Violence and Reconciliation cited in T W Bennett 'uBuntu: An African Equity' http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per_old/issuepages/2011volume14no4/2011x14x4UubuntuBennett.pdf accessed 2 May 2013 p.40.

⁴⁷¹ [2006] 2A CC10.

here to 'acknowledge a sense of uBuntu and to emphasise restorative rather than retributive justice'⁴⁷²

Bennett notes however that the approach of the private law courts specifically has been conservative with regard to uBuntu, fearing perhaps uncertainty in the law and a threat to the notion of autonomy.

A useful summary of the effects of uBuntu in South African law is reproduced below:

Restoring social harmony is now one of the central aims of South Africa's sentencing policy. For example, in *M v S (Centre for Child Law Amicus Curiae)*, which dealt with correctional supervision, the court commended the fact that restorative justice places crime control in the hands of the community rather than criminal justice agencies. As a result, the offender has a better chance of social rehabilitation without suffering the negative effects of a prison sentence, loss of a job and possible destruction of family networks.⁴⁷³

In the context of criminal law, Bennett notes that restorative justice has always played a significant role in African justice and continued through to the TRC.

The Truth and Reconciliation Commission appointed to deal with human rights violations in the political atmosphere of apartheid, felt that forgiveness was an essential part of the system. The aim was to look forward rather than back. In the book *The Sunflower*⁴⁷⁴ by Simon Wiesenthal, philosophers, people of religion and academics are asked to comment on the story of a young German soldier who begged for his forgiveness for the crimes he took part in, when Wiesenthal was imprisoned in a Nazi concentration camp. In response, Desmond Tutu states:

it is clear that if we look only to retributive justice, then we could just as well close up shop. Forgiveness is not some nebulous thing. It is practical politics. Without forgiveness, there is no future.⁴⁷⁵

The idea of the Commission was for people to be able to give statements about the gross human rights violations, which had taken place during the apartheid system.

⁴⁷² T W Bennett 'uBuntu: An African Equity' http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/per_old/issuepages/2011volume14no4/2011x14x4UubuntuBennett.pdf accessed 2 May 2013 p.44.

⁴⁷³ T W Bennett 'uBuntu: An African Equity' http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/per_old/issuepages/2011volume14no4/2011x14x4UubuntuBennett.pdf accessed 2 May 2013 p.44.

⁴⁷⁴ Simon Wiesenthal, *The Sunflower: On the Possibilities and Limits of Forgiveness* (Schocken 1976).

⁴⁷⁵ Simon Wiesenthal, *The Sunflower: On the Possibilities and Limits of Forgiveness* (Schocken 1976) p.268.

Crucially, some of those who had perpetrated the violence were also able to give statements. The Commission was set up following the terms of the Promotion of National Unity and Reconciliation Act No 34 of 1995. In some circumstances, amnesty was granted, and financial reparations made to victims. It consisted of three committees: the Human Rights Violation Committee; the Reparation and Rehabilitation Committee (for victims) and an amnesty committee, for those offenders who applied for amnesty in accordance with the provisions of the Act. Importantly, the Commission was also able to hear evidence of acts of atrocity committed by liberation forces as well as the apartheid government. The alternative was highly praised for its reconciliatory approach.

In a remarkable book exploring a shared journey between a clinical psychologist, Pumla Gobodo-Madikizela and Eugene de Kock, a perpetrator of crimes during apartheid as the commanding officer of some of the apartheid death squads, the author refers to the process of forgiveness as a very practical one, and one which actually worked. The mistake is to see the political as separate from the personal – to see discontinuities between them. In dealing with the past, the narratives that people construct about what happened to them, the stories of their suffering, reflect the continuities between their personal and political lives.⁴⁷⁶

The TRC encouraged forgiveness and indeed heard many stories, where victims were able to recount the stories of the horrific treatment that they had endured but at the same time be reconciled or even forgive the perpetrators. On the other hand, for some victims, the retelling of these stories made matters worse. However the role of forgiveness here is interesting – the evidence is that those who felt worse after the retelling of their stories only did so, when they were unable to get some sort of resolution, or where information (such as the location of a body) was not available to them. Reconciliation evolved from the truth.

One of the fundamental tenets of the Commission was a recognition that both sides were responsible to some extent, and that all those who wished to speak would be allowed to.

⁴⁷⁶ Pumla Gobodo Madikizela, *A Human Being Died That Night: Forgiving Apartheid's Chief Killer* (Portobello Books 2003) p.102.

This is described by Tutu as:

the very essence of being human. We say a person is a person through other persons. We are made for togetherness, to live in a delicate network of interdependence. The totally self sufficient person is subhuman for none of us comes fully formed into the world. I need other human beings in order to be human myself. For uBuntu the summum bonnum the greatest good is communal harmony. If one person is dehumanised then inexorably we are all diminished and dehumanised in our turn. uBuntu gives up on no-one. No one is a totally hopeless and irredeemable case.....Restorative justice is singularly hopeful, it does not believe that an offence necessarily defines a perpetrator completely a when we imply that once a thief then always a thief. We had to point out that yes indeed these people were guilty of monstrous even diabolical deeds on their own submission but and this was an important but, it did not turn them into monsters and demons. To have done so would have meant that they could not be held responsible.⁴⁷⁷

In terms of this discussion, no one is irredeemable. Forgiveness, as I pointed out earlier in this thesis, allows us to separate the offender from his act, but does not prevent them from being punished for the harm committed.

Amnesty was granted on the basis of political motivation in the TRC. However, it was agreed that there was to be no general amnesty. Each application was to be heard independently, in order to decide whether the applicant satisfied the stringent conditions for granting it:

it was felt very strongly that general amnesty was in fact amnesia. It was pointed out that we, none of us, have the power to say, let bygones be bygones. Our common experience is in fact the opposite – that the past, far from disappearing or lying down and being quiet, is embarrassingly persistent, and will return and haunt us unless it has been dealt with adequately. Unless we look the beast in the eye we will find that it returns to hold us hostage.⁴⁷⁸

The conditions for individual amnesty were that the atrocity happened between 1960 and 1994, the date of President Mandela's inauguration; the act was politically motivated (in response to an order) rather than say as a result of personal greed; there had to be full disclosure of all the relevant facts relating to the offence for which amnesty was being sought. Victims had a right to oppose, but not to veto it. In fact, few did. Remorse was not a requirement but the telling of a story and full disclosure means that an offender who benefits from amnesty accepts responsibility for his

⁴⁷⁷ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) p.35.

⁴⁷⁸ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) p.35.

actions. Tutu gives an example of when amnesty not being granted on the grounds that the offender did not accept guilt (the police officers who applied for it, for their part in the death of Steve Biko – they claimed they acted in self-defence).

Tutu states that the ideal of restorative justice was appropriate for the Commission:

here the central concern is not retribution or punishment but in the spirit of uBuntu the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and perpetrator, who should be given the opportunity to reintegrate into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something which has happened to people and whose consequence is a rupture in relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation.⁴⁷⁹

The justification for this was on the basis of the philosophy of uBuntu – the idea that one person's humanity is inextricably bound up in theirs. It means that a gross violation of human rights affects all – the victim and the perpetrator:

to forgive is not just to be altruistic. It is the best form of self interest.. What dehumanises you inexorably dehumanises me. Forgiveness gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanise them... uBuntu means in a real sense that even the supporters of apartheid were victims of the vicious system which they implemented and which they supported so enthusiastically. Our humanity was intertwined. The humanity of the perpetrator of apartheid's atrocities was caught up and bound up in that of his victim whether he like it or not.⁴⁸⁰

Whilst clearly different from a traditional criminal trial, the process of the Commission seemed to be able to make forgiveness a fair tool for dealing with offenders. In particular, there was an emphasis on the need for story telling and narrative, rather than a forcing of forgiveness. Overwhelmingly, it was used and given in many cases, even the most harrowing ones. Perhaps this is an issue of trust, and also of the conception that those who commit crimes are not the other but are bound up in our own lives.

⁴⁷⁹ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) p.35.

⁴⁸⁰ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) p.35.

The previous chapters have looked at the philosophical basis for the limited use of mercy in criminal law and punishment and have sought to explain that limitation by examining the Kantian conceptions of law and punishment. I have also explained different views of punishment based on relational responsibility, public trust, and the real life examples of reconciliation commissions and restorative justice, widely used in a number of contexts throughout the criminal justice system, notably in youth crime.

In conclusion, we can say that uBuntu philosophy might inform our search for forgiveness in the criminal justice process. It emphasises a number of themes raised in this thesis. Firstly, it rejects Kantian reason as the basis for morality. It is based instead on a view of the subject as having singular dignity, but also as being inextricable from the community in which he lives. In the same way that Levinas' subject is called, pre-ethically and pre-politically to the other, the subject in uBuntu has an ethical call to the community from the moment of birth. The separation from the mother symbolises and signifies the fact that the call is made to an as-yet undeveloped individual who must act ethically. There is a responsibility, not a right, to be part of that community:

each one of us has the potential to embody humanity, or humanness, understood from an ethical perspective. Further, uBuntu requires us to come out of ourselves so as to recognise the ethical quality of humaneness. We are required to take that first ethical action without waiting for the other person to reciprocate. uBuntu is not then a contractual ethic. It is up to me.⁴⁸¹

This could apply to both victim and offender. One of the characteristics of the Truth and Reconciliation Commission is that satisfaction, and in some cases, healing, was achieved for the victims through the power of truth and story-telling. A similar effect can be witnessed through the Forgiveness Project. Whilst these are not part of the law, the stories show the effect on victims and most importantly, perpetrators. This has an impact on the power of victim personal statements, mentioned earlier.

⁴⁸¹ Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham 2014) p.112.

7.4 Forgiving the interconnected subject

In this chapter I have presented the argument that the different lens referred to in earlier chapters may be seen in a number of different ways. Instead of the Kantian reasoned individual, we may make room for forgiveness, either because we do not look backwards, and instead adopt a Levinasian approach to forgiveness, or because we acknowledge that forgiveness may have a place in a legal schema.

In the first part of this chapter, I provided a critique of Meyer's contention that the Kantian system of justice cannot accommodate mercy and forgiveness on the grounds of its to reason. In examining Levinas' work in more detail I have found that the political (which would accommodate mercy) and the ethical (which would accommodate forgiveness) are separate issues in his thought. There is no room in the political sphere for either. We can argue, however, that there is a 'zone of indistinction'⁴⁸² which blends private and public; judgment and emotion. This may provide a way to locate mercy and forgiveness, caught between these two poles.

I then showed, through a reading of Cornell's dignity jurisprudence that a philosophy which retains dignified singularity, but with a call to the other, can inform a theoretical search for forgiveness and mercy. In particular, the healing power of narrative, which we can also observe through the stories of the Forgiveness Project, emphasises the gradual nature of forgiveness as a process, defined by each individual wishing to express it. A clearer theoretical basis may be needed to articulate mercy in our legal system in a better way.

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Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Nomokoi Critical Thinkers Series, Cavendish 2007) p.59

8. THE LONG ROAD TO FORGIVENESS: CONCLUDING REMARKS

Dear Emma Price – my name is Mary Pritchard. Daniel Pritchard – the boy you killed was my son. This is not a hate letter, so don't throw it away. The only time I saw you was in court, and you looked so normal to have done such a terrible thing. And now you seem to be part of our lives, squatting like a huge cuckoo. The fact is, I'm haunted by you, and I know nothing about you. I wondered if you could write back and tell me a little about yourself? I realise that you must think this very strange, but it would help me so much if you could do this. I need to understand what has happened. I need the whole story so I can make sense of this senseless thing. Thank you very much. Mary Pritchard.⁴⁸³

This thesis started with the play, *The Long Road*, from which this quotation is drawn. In many ways, the characters in the play symbolise the tensions described throughout this thesis of a morally upright, retributive Kantian legal system in which mercy and forgiveness for a perpetrator of crime cannot be tolerated. In this chapter, I will draw these issues together, using the play to offer an explanation in practice.

When Mary's husband, John, finds the letter she plans to send to Emma, the girl who is serving a prison sentence for murdering their son, he gets angry and is sceptical. Whilst Mary is not quite ready for forgiveness, she seeks the solace of answers and understanding, and wants to tell her story, too. The passage above, and John's reaction to it, demonstrate the trauma felt by both victim and offender on a number of levels.

The cuckoo, a bird which grows and takes over the available space in the nest, forcing the other babies out, can be seen here not only as a reference to Emma, but as a metaphor for forgiveness itself. Alternatively, perhaps, it represents the anger felt in the aftermath of an attack. Either way, if the presence of forgiveness, anger or the offender is ignored, no one is satisfied, except perhaps temporarily, when the court administers objective 'justice'. Perhaps the best that can be hoped for is to accept that forgiveness is a tool that is recognised and occasionally sought by victims. It does not have answers or solutions, and is a difficult road to follow. In order to do so effectively, its use in the criminal justice system must be better articulated and supported.

⁴⁸³ Letter written to Emma Price by Mary Pritchard in Shelagh Stephenson, *The Long Road* (Methuen Plays 2008) p.33

In the context of mercy and forgiveness, I have argued that the Kantian approach of reason as the basis for a system of law and punishment, and the abstract notion of the criminal subject, may not be the only solution. A criminal justice system based on Kant excludes mercy and its corollary, forgiveness, on the grounds that reason is the only ground of morality. The criminal subject is seen as a free individual agent, capable of making autonomous, moral choices. The sanctity of the individual's agency and responsibility is paramount. Ideally, this contributes to an ethical society based on a social contract in which offenders understand that crime begets punishment on a desert or retributive model. Retributivism is

noble, protects the offender and treats like cases alike. It gives meaning to the pain of punishment, it limits and rationalises revenge, and it treats offenders with dignity. Retributivism also keeps mercy at bay, primarily by arguing that mercy is demeaning and unequal.⁴⁸⁴

I have shown how mercy and forgiveness is not as incompatible with law as might first appear, and that, in fact, it is to be found in the criminal justice system, albeit in a very limited way. Mercy, in some circumstances, forms part of a just decision, and therefore some commentators have argued that it is not incompatible with justice, in the sense of desert. For the most part, it is generally opposed. This is largely because for many, mercy and forgiveness represent the irrational, the inconsistent and the emotional. It is excluded from the criminal trial, on the grounds that to allow it would prejudice those to whom it was not granted. This opposition is also due to the fact that we have moved from a system of criminal law based on restoration and reconciliation to one of retribution of desert. An important part of this shift has been the transfer of power from local level, to the sovereign, and ultimately, to the State. The State has therefore become synonymous with justice, fairness and proportionality. Any gesture of mercy or forgiveness could not be made publicly by a judge or official, who in any event, would not have the standing to forgive, except in very limited circumstances, such as in the exercise of the Royal Prerogative of Mercy.

Forgiveness, on the other hand, is a private matter between the victim and the defendant, not a matter for the courts. Victims are traditionally excluded from the criminal trial, on the grounds that to include them would also compromise the ideals

⁴⁸⁴ Linda Ross Meyer, *The Justice of Mercy* (University of Michigan Press 2010) p.161.

of fairness and proportionality, which the system holds so dear. Mercy, if it is to belong at all, can be found in the public, political sphere, and forgiveness belongs to the private, ethical sphere. It is also affective, and therefore has no place in objective legal analysis. Jeffrie Murphy goes further than this, and argues that forgiveness, if given too freely, denies the victim dignity and self-respect. On the contrary, the vindictive emotions are to be supported, as healthier, dignified responses. In my critique of Kantian justice, I have argued that this is an inconsistent, impoverished view of justice and emphasizes the inconsistencies in criminal law outlined by Norrie. A more consistent approach, through an articulation of mercy and forgiveness, would allow us to accommodate those judges and victims who want to make it happen as part of the justice process.

My starting point has been the Kantian criminal law. The abstract criminal subject cannot allow for mercy or forgiveness. Having examined some of the features of forgiveness and mercy in Chapter 3 and Chapter 4, I started to unpick some of the myths of a Kantian criminal law and explain how Kant's moral philosophy became the lynchpin of the substantive and procedural criminal law. I showed how Alan Norrie has critiqued the 'false separation' of actual and juridical man, pointing to a simulacra of morality, first imagined by Alisdair Macintyre. Norrie argues that the criminal subject is not an abstract legal individual but a political and social individual who may be influenced by many factors. As a result, far from being the rational law it purports to be, the criminal law is full of inconsistencies and contradictions. In our failure to consider the political and social circumstances, which shape an offender's propensity to commit crime, we are exacerbating those contradictions and illogicalities. This is of great relevance to mercy and forgiving. Law's assertion that mercy cannot be tolerated on the grounds of inconsistency, and unfairness to one offender to the advantage of another, displays this irrationality.

Kant is clear that mercy has no place in the perfect system of punishment, except as a virtue. The challenge is that individuals, who commit crimes are not abstract legal individuals, but political, ethical and social individuals, who may have all sorts of backgrounds and influences which the law does not take account of. This idea is demonstrated in *The Long Road*. Emma, the offender, has plenty of such factors.

Law, here is represented by John's comment:

I don't care if she had a rubbish childhood. I had a rubbish childhood and I don't go around stabbing strangers because they won't give me the money for crack or heroin or whatever it was.⁴⁸⁵

Mary, closer to understanding, and Elizabeth, the social worker, do not take such a retributive view, seeing the person behind the crime:

Murderers. Which of course is ridiculous, they can't be in murder mode all the time, can they? They must do normal things like tell jokes and go to the supermarket. When they're not murdering people.⁴⁸⁶

Whilst it is true that the political and social experiences of the defendant might be usefully deployed in criminal trial beyond mitigation hearings, there is a need for the procedural inclusion of forgiveness as a tool in sentencing overall. This could be introduced on an ethical understanding of the subject, not on a political or social one. Norrie's argument that recourse to the political nature of the subject would support a way of introducing mercy into judicial decision making does not help us with the introduction of forgiveness, which, as an ethical consideration, is privately motivated, outside the realm of the courts and politics.

The setting for the play is a restorative encounter. In Chapter 5, I have discussed such encounters, which seem to be the ideal setting for forgiveness from the part of the defendant to the victim. These encounters are not easy for either party, and I showed that in fact they are unsatisfactory. In many ways, they retain retributive qualities.

One of the inherent contradictions in criminal justice thinking is law's insistence that it is rational, not emotional. In Chapter 6, I have shown that the emotions are used in legal decision-making by judges, in merciful or lenient sentencing, and in the substantive criminal law in criminal defences. However, these are not well articulated. In particular, I highlighted how compassion has been recently incorporated into the law, in its widest sense, in prosecutorial guidance and the subsequent confusion in the

⁴⁸⁵ Shelagh Stephenson, *The Long Road* (Methuen Drama 1998) p.43.

⁴⁸⁶ Shelagh Stephenson, *The Long Road* (Methuen Drama 1998) p.23.

interpretation of prosecutorial guidance and in sentences themselves. This confusion can be seen in recent case law relating to mercy killing. As I write, judgment is awaited on the fate of a man seeking clarification on whether his doctor will be prosecuted for assisting in his death at his own request⁴⁸⁷. Will the law show him compassion, or the DPP show forgiveness in making the decision to prosecute?

The difficulty and complexity of the emotions inherent in forgiveness is acknowledged by both Mary and Joe in *The Long Road*:

I have to try and hold the two things side by side in my hands: the ordinary girl, the terrible thing. Because I think now, they're both true. They both have equal weight. One doesn't cancel out the other. Does it? I thought when I started this that all I had to do was say I forgive you and then the healing would start. But I can't say it. Yet, not truthfully anyway it's a long road. I understand that now. Sometimes I feel forgiveness and sometimes I don't. Sometimes I wake up in the morning and for a split second I forget that Dan is dead. And when I remember it's as new and harsh and as overwhelming as it was on that very first morning. And I don't feel full of forgiveness and love. I feel full of despair and anguish and fury at the person who did it. Forgiveness wouldn't make the grief go away. That's what I've learnt. I must have hoped it would but when I started this I'd no idea what I was doing. No one tells you how to do these things you don't expect you'll ever need to. So I'm just groping along in the dark as best I can.⁴⁸⁸

In terms of criminal defences, in both the common law and statute, I have observed how judges are prepared to recognize the emotions in some situations, but not in others. In the common law defence of necessity, mercy was reluctantly shown in the well-known case of *Dudley and Stephens*, despite the family's wish to forgive. Furthermore, victim personal statements, which, at present are not supposed to influence a judge, are emotional statements made by a victim which are being heard in a legal setting. On occasions, these victims wish to forgive. The world of affect is not so far removed from the world of reason:

should the victim and offender, through some form of mediation or reconciliation process, not be able to reach forgiveness, even that conclusion is one that can empower the victim. The result is a process that creates more options, and not less, for the victim (and possibly the offender). Most systems today resign the victim to the disempowered role of witness for the prosecution.⁴⁸⁹

⁴⁸⁷ R (on the application of Nicklinson and Another) v Ministry of Justice [2014] UKSC 3.

⁴⁸⁸ Shelagh Stephenson, *The Long Road* (Methuen Drama 1998) p. 57.

⁴⁸⁹ Douglas B. Ammar, 'Forgiveness and the Law - A Redemptive Opportunity', 27 *Fordham Urb. L.J.* (1999) p.1594.

In researching mercy, I found evidence of it at work both in judicial discretion in sentencing and in the criminal defences. In both cases, I found that it is badly articulated and often confused with other concepts. Judicial discretion in sentencing is far from unfettered, and this does not help us in our quest for mercy. Clearly, the role of judicial or political mercy needs to be defined better, with clear guidelines for the use of it in criminal trials, and probably as part of the sentencing process. If aggravating and mitigating factors can be considered as part of sentencing, then the victim's views can also be taken into account. Mercy can be something for a judge to consider as part of his overall role, without necessarily compromising justice. This is the Shakespearean view of perfect justice, seasoned by mercy. In terms of that redefinition, we saw that this could be done through an improvement to the Victim Personal Statement process in sentencing, or as an improvement to the mitigation process.

The next question is whether we can find a theoretical basis for the introduction of either mercy better articulated in the public, political sphere, or of private forgiveness that is, fast becoming part of the public sphere too. I argued that the Kantian insistence on the split between public and private justice, at least in criminal law is a false one, as the lines are becoming blurred. I supported this argument by explaining recent initiatives for the greater inclusion of victims into the criminal justice system, and the compulsory introduction of restorative practices into sentencing guidelines. These initiatives all demonstrate that the public and private divide is losing credence. If there is no longer a strict divide between private and public, between civil and criminal law, it is at least possible that forgiveness could be a valid consideration.

In Chapter 4 and 7, I introduced the idea that we can consider an alternative theoretical basis for criminal liability and punishment, one which would allow for the possibility of mercy, traditionally dismissed as evidence of irrationality in judicial decision making, and for being dangerous to the rule of law and its due process. This theory would concentrate on the criminal not as lacking in political subjectivity but as the subject of an ethical encounter. Instead of asking why socio – political notions are not included in our invention of the criminal subject, we might ask whether despite those characteristics there is a responsibility or call to the other (in this case, the

individual accused of crime). This ethical encounter would require forgiveness. In this way, mercy becomes necessary, not irrational. Linda Ross Meyer argues for a reconception of the Kantian paradigm on the basis of Levinas' first philosophy, which requires a fundamental ontological shift involving a pre-ethical call to the other. Meyer's vision of Levinas' philosophy justifying mercy is a start. However, what is also necessary, is a more detailed discussion of what the political and the ethical entails for Levinas, and whether this could encompass notions of mercy. I have found in my reading of Meyer that mercy and forgiveness are placed in direct opposition to Kantian reason. In doing so, she fails to account for the changing nature of legal practice.

On further scrutiny of Levinas' work, we can observe that he was certainly interested in time, forgiveness, and rebirth and that the distinction between politics and ethics is not a dramatically clear-cut. This zone of indistinction spans not just private ethics and public politics, but the boundaries of emotion and reason, too. In making a decision to trust, or to take a risk, we are making a judgment, but if we decide to take that risk (to forgive one who has harmed us, too) then we are also bestowing a gift on the one to be trusted or forgiven. We might use this argument to say that forgiveness as a private, ethical gesture can find its way into the public sphere of judgment and legislation. Mercy is already there.

I will refer again to *The Long Road*. The play opens with Joe's description of the moment of the murder and the traumatic effect on the family. The description of the trauma suffered on hearing the news takes on a chaotic hue, reminiscent of Linda Ross Meyer's description of post-offence as a trauma into which both parties are thrown. As time goes by, it becomes apparent that for Mary, Dan's mother, it is important that some kind of understanding is reached, and that the initial anger she feels, especially, when she sees Emma's face in the newspaper attending a prison workshop, must be taken over by something more constructive:

there's this kaleidoscopic anger inside me... things I have never felt before, and I realise I could kill someone.⁴⁹⁰

⁴⁹⁰ Shelagh Stephenson, *The Long Road* (Methuen Drama 1998) p.16.

John says that his son's memory is not rubbed away by time. For John, his anger is a relief:

now Mary wants us to talk about the girl that did it to us. Why? I want to wipe her off the face of the earth. I'm not interested in people in prison, they've nothing to do with me, they're criminals, they've wrecked people's lives and I refuse to think about them. Why did I think I could take the pain away? The only time it goes away is when briefly for a moment, I imagine shooting her.⁴⁹¹

Levinas describes forgiveness as a rebirth; this is possible though it is much harder to realise in practice. John's response in *The Long Road* is Kantian, since he refuses to acknowledge that Emma may have acted as she did due to her circumstances. Mary, on the other hand, wants to understand and to move towards the light, not because she feels the circumstances are excusable but because she wants to connect or "unify" with Emma.

In *Giving an Account of Oneself*, published in the aftermath of the attacks on the Twin Towers in New York in September 2001, Judith Butler tackles the idea of the subject's ethical responsibility. The account is particularly important in the context of forgiveness, given the eye-for-an-eye responses evident in the speeches of the President and the subsequent action taken. An offender who has committed a crime and a victim who has suffered from it seem to be irreconcilable, yet perpetrators of crimes seek forgiveness and, victims want resolution and will often consider it. Using this argument to think about the problem of criminal punishment, we cannot ignore the presence of the other in society, even if he or she appears to be alien, appears to be a stranger:

prior to judging another, we must be in some relation to him or her. This relation will ground and inform the ethical judgments we finally do make. We will in some way have to ask the question 'Who are you?'. If we forget that we are related to those we condemn, even those we must condemn, then we lose the chance to be educated or 'addressed by a consideration of who they are and what their personhood says about the range of human possibility that exists even to prepare ourselves for or against such possibilities...the institutions of punishment and imprisonment have a responsibility to sustain the very lives that enter their domains precisely because they have the power in the name of ethics to damage and destroy lives with impunity.'⁴⁹²

⁴⁹¹ Shelagh Stephenson, *The Long Road* (Methuen Drama 1998) p.24.

⁴⁹² Judith Butler, *Giving An Account of Oneself* (Fordham University Press 2005) p.45

Given that Kant's influence on legal thinking and the legal system has many opponents and many supporters (despite the inconsistencies and contradictions of the system), perhaps the most sensible approach would be instead of proposing a new theory of criminal law, to acknowledge that mercy exists and to allow it as an example of discretion:

mercy takes place in a morally imperfect world. It may be a response to those imperfections or it may be a manifestation of them. It is in the nature of mercy to elude too much generalisation. Rather than seeking a grand unified theory of mercy – or one of punishment – we might gain more insights into ourselves and our penal practices by engaging merciful judgments as expressions of the unresolved dilemmas of crime and punishment.⁴⁹³

In trying to reconcile the political and the legal, so as to accommodate the spirit of forgiveness, I have taken inspiration from Drucilla Cornell's analysis of the philosophy of Ubuntu. Although it was incorporated into the constitution and the founding instruments of the Truth and Reconciliation Commission and in some areas of substantive and procedural law in South Africa, it can be said to have an increasing influence, not least due to the judgments of Yvonne Makgoro.

The consideration of the equal treatment of rights and responsibilities in a criminal case, with duties being equal to rights, is a seductive argument for any justice system. It has parallels with the relational responsibility, discussed by Pillsbury and Ammar, and much less in common with a retributive, Kantian system of justice. At the same time, the subject envisaged in an Ubuntu philosophy retains its dignity and singularity, whilst experiencing a call to the other as part of a community.

The road to forgiveness is not an easy process:

this is a long road you're choosing to go down. You might feel better about certain things, but you'll probably feel worse about others. And I wish I could say you'll feel better at the end of it, but it's possible you won't.⁴⁹⁴

It is different for everyone. It may require an apology, it may give you strength. It may be difficult to achieve. It may not mean forgetting. This is reflected in the many

⁴⁹³ Austin Sarat *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* (Cambridge University Press 2012) p.233

⁴⁹⁴ Shelagh Stephenson, *The Long Road* (Methuen Drama 1998) p.21.

stories in The Forgiveness Project. What is important, however, is to understand that for the majority of those who wish to forgive, it is for the sake of empowerment, dignity and self-respect, without compromising the call to the other, or the dignity of the other. It is possible, as uBuntu shows, to accommodate both. Unless we acknowledge that it can be an improvement of justice, the victim is left with Murphy's self-respect intact, but also with a sense of incompleteness in the shadow of the adversarial criminal trial. As Mary and Joe tell John in relation to Emma:

you can stay in the dark, but I'm walking towards the light.... We're shackled to her, Dad, and Mum's trying to unshackle herself.⁴⁹⁵

We can only hope that the criminal justice system can enable Mary to shed those shackles, should she feel inclined to do so.

⁴⁹⁵ Shelagh Stephenson, *The Long Road* (Methuen Drama 1998) p.44.

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